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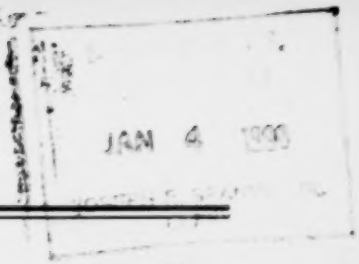

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS SOBOL, as Commissioner of the New York State Education Department,

Petitioner,

– against –

CLIFFORD BURR, by his Parents and Next Friends, KENNETH BURR, BETTY BURR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether an award of compensatory education imposed against a state because of a past violation of a federal right is barred by the eleventh amendment.

2. Whether a federal court order vacating a state Commissioner's order and reinstating an impartial hearing officer's ruling that the state provide compensatory special education to an adult to redress past procedural violations of the Education of the Handicapped Act is barred by the eleventh amendment.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by citizens or subjects of any foreign state.

20 U.S.C. § 1412(2)(B) provides:

> (B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the state not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the state not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any state if the application of such requirements would be inconsistent with state law or practice, or the order of any court, respecting public education within such age groups in the state;

20 U.S.C. § 1415(b)(1)(E), entitled Procedural Safeguards provides:

> an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

No. 89-

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Thomas Sobol, Commissioner of the New York State Education Department, petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered on October 27, 1989. That judgment was rendered after this Court granted certiorari, vacated the Second Circuit's prior judgment, and remanded for reconsideration in light of *Dellmuth v. Muth*, 491 U.S. ____, 109 S. Ct. 2397 (1989). The Court's opinion in *Sobol v. Burr* is reported at 491 U.S. ____, 109 S. Ct. 3209 (1989) and is reprinted in the appendix to this petition at 7a.

Opinions Below

The opinion of the Court of Appeals reinstating its prior opinion is reported at 888 F.2d 258 (2d Cir. 1989). It is reprinted in the appendix to this petition at 1a to 4a. The Court's prior opinion is reported at 863 F.2d 1071 (2d Cir. 1988). It is reprinted in the separately bound supplementary appendix to this petition at 1a to 17a.

The opinion of the United States District Court for the Southern District of New York is unreported and is reprinted in the supplementary appendix to this petition at 26a to 33a. An opinion of the district court addressing respondent's claim for administrative attorneys' fees is reported at 683 F. Supp. 46 (S.D.N.Y. 1988) and is reprinted in the supplementary appendix to this petition at 18a to 25a.

The decisions rendered by the impartial hearing officer and Commissioner Ambach are unreported and are reprinted in the supplementary appendix to this petition at 43a to 121a and 34a to 42a, respectively.

Jurisdiction

The judgment of the Court of Appeals on remand was entered on October 27, 1989. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1)(1964 & Supp. 1989).

Statement of the Case

Respondent Clifford Burr, by his parents, commenced this action pursuant to 20 U.S.C. § 1415(e)(4) to challenge a limited aspect of the decision made by the Commissioner of the New York State Education Department ("SED"), upon his review of a decision rendered by an impartial hearing officer under the Education of the Handicapped Act, 20 U.S.C. § 1400 et seq. ("EHA" or "The Act"). Respondent's parents contested the Commissioner's decision to the extent that it reversed the hearing officer's determination that Clifford be provided an additional year of education at the Institute, at state expense, after he

reached the age of twenty-one, because of delay in an administrative hearing involving Clifford's placement at the New York Institute for the Education of The Blind ("Institute"). S. App. at 41a-42a.[1] The essential dispute between the Burrs and the Institute at the impartial due process hearing was whether the Institute was an appropriate placement for Clifford. The Burrs did not challenge the major portion of the Commissioner's decision on appeal, which affirmed the decision of the hearing officer that the Institute was an appropriate placement.

Clifford Burr is a multiply handicapped adult who is blind and suffers from cerebral palsy and profound mental retardation. S. App. at 34a.[2] He was twenty-one years old on December 30, 1988. S. App. at 45a. As of December 1984, when he was almost seventeen, he functioned at the academic level of a 20-month old child. S. App. at 35a. In light of his multiple handicaps and profound mental retardation, the primary goal of Clifford's individualized education programs ("IEPs"), see 20 U.S.C. § 1401(19), is habilitation, or training in life skills, such as feeding and dressing himself. S. App. at 117a-118a.

Under the EHA, the local educational agency is responsible for providing special education, designing the IEP and making placement recommendations for handicapped children who reside in the school district. 20 U.S.C. §§ 1401(19), 1414(a)(5); 34 C.F.R. § 300.341, App. C.; N.Y. Educ. Law § 4402. The EHA requires that "a free appropriate public education be available" to handicapped children who are between the ages of three and twenty-one, unless there is a state law to the contrary. 20 U.S.C. § 1412(2)(B). New York state law provides education until the end of the school year in which the student attains the age of

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[1] The Institute is a privately owned school offering services to the blind. It receives tuition support from the state for a percentage of its pupils. N.Y. Educ. Law § 4207(4).

[2] Citations to "A.____" are references to the Appendix in the Second Circuit. Citations to "App. at ____" are references to the appendix to this petition. Citations to "S. App. at ____" are references to the separately bound supplementary appendix to the petition.

twenty-one. N.Y. Educ. Law §§ 3202, 4401(1), 4402. The part of the local educational agency responsible for Clifford's IEP and his educational placement was the Committee on the Handicapped ("COH") of the New York City Board of Education, Brooklyn School District, District 21, where Clifford resides. A. 255-257. Clifford's first educational placement was at a preschool program in Brooklyn. He then attended the Jewish Guild for the Blind, and then the Association for the Advancement of the Blind and Retarded ("AABR"). S. App. at 45a. Both were private schools offering services to the handicapped and each placement was arranged for Clifford by the COH of District 21 of the New York City Board of Education. *Id.*

A. *Proceedings Before The Impartial Hearing Officer*

In the Spring of 1984, the AABR informed the Burrs and the COH that Clifford's AABR program would close in June of that year. S. App. at 35a. The COH developed a new IEP and recommended that Clifford be placed at a Special Education Program at Public School 396 in Brooklyn. Although Clifford's parents agreed that the goals and services provided for Clifford in the new IEP were appropriate, they rejected the placement at P.S. 396. S. App. at 45a-46a. The COH attempted to locate other placements and in the interim provided Clifford with home instruction pursuant to Clifford's IEP at no cost to the Burrs. S. App. at 36a.

The COH contacted several private schools in an effort to locate an alternative placement for Clifford, but the private schools rejected him. S. App. at 36a. Pursuant to N.Y. Educ. Law § 4206(3) and 8 N.Y.C.R.R. § 200.7(d), the Burrs asked the SED to appoint Clifford to a state supported school for the blind. Their application was referred to the Institute. 8 N.Y.C.R.R. § 200.7(d). The Institute, after evaluating Clifford, informed the Burrs that it would not recommend Clifford for appointment to the Institute. S. App. at 36a.

On December 21, 1984, the Burrs requested an impartial hearing pursuant to 20 U.S.C. § 1415(b)(1)(E) and 8 N.Y.C.R.R.

§ 200.7(d)(1) to challenge the Institute's rejection of Clifford. Pursuant to the state regulation in effect at the time, 8 N.Y.C.R.R. § 200.7(d)(1), the SED designated a hearing officer in timely fashion to conduct the hearing involving the Burrs and the Institute.[3] A. 233. The parties requested several adjournments, S. App. at 51a-52a, 62a-63a, n.8, A. 235, 236, and, pursuant to a federal regulation permitting a hearing officer to grant such adjournments, the requests were granted. 34 C.F.R. § 300.512(c). The hearing, which was vigorously litigated by the Burrs and the Institute, was not completed within the 45-day period provided by the federal and state regulations.[4] 34 C.F.R. § 300.512; 8 N.Y.C.R.R. § 200.5(c)(10).

On January 27, 1986, the hearing officer decided that Clifford should be placed at the Institute and that because of the delay in the completion of the hearing his education at the Institute "shall continue until the end of the school year in which Clifford shall attain the age of 22 years". S. App. at 120a-121a.

B. *Appeal To The Commissioner*

The Institute, as a party aggrieved by the hearing officer's decision, appealed to the Commissioner pursuant to 20 U.S.C. § 1415 and 8 N.Y.C.R.R. § 200.7(d)(1). The filing of briefs on the appeal to the Commissioner was completed on March

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[3] In 1987, the New York State Education Department amended its regulations regarding applications to state-supported schools. 8 N.Y.C.R.R. § 200.7(d)(1)(ii)(1987). Under the current version, if a parent disagrees with the recommendation made by a local school board's committee on special education (the successor to the COH) as to such an application, the parents may ask the local board to appoint a hearing officer to review the recommendation. *Id.*

[4] Respondent was represented at the Institute hearing first by one advocate and then by three different attorneys and six student interns from the Federal Litigation Clinic of New York Law School. S. App. at 50a, n.4. Respondent cross-examined one Institute witness for six days of the 16-day hearing, S. App. at 64a, n.11, and the parties generated a transcript of approximately 2000 pages and another 2000 pages of exhibits. S. App. at 52a.

31, 1986 and the Commissioner rendered his decision on May 20, 1986. Thus, the Commissioner rendered his opinion on a 4,000 page record only 20 days after the 30-day time period specified in the federal regulation. 34 C.F.R. 300.512(b). The Commissioner sustained the hearing officer's order that Clifford attend the Institute but reversed the hearing officer's order requiring that Clifford receive an additional year of education at the Institute at state expense beyond the age of twenty-one. S. App. at 42a. The Commissioner referred to his earlier decision in which he had held such relief to be unauthorized by any statutory or regulatory provision. *Matter of a Handicapped Child*, 19 Ed. Dept. Rep. 148 (1979). S. App. at 41a. Noting a split in the federal courts of appeal on whether compensatory education is available under the EHA, the Commissioner held that under the circumstances of this case such relief would, in any event, be unwarranted. *Id.* Pursuant to the Commissioner's decision, and in accordance with New York and federal law, Clifford attended the Institute from June of 1986 until June of 1989, the end of the school year in which he attained the age of twenty-one. S. App. at 37a-38a. N.Y. Educ. Law §§ 3202, 4401, 4402(5); 20 U.S.C. 1412(2)(B). He is presently attending the Institute pursuant to the vacated and then reinstated judgment of the Second Circuit. He was twenty-two years old on December 30, 1989. The "school year in which Clifford shall attain the age of twenty-two years", S. App. at 120a-121a, ends on June 21, 1990.

C. *Proceedings In The District Court*

Respondent's complaint in the district court challenged the Commissioner's decision insofar as it reversed the hearing officer's order that an additional year of education at the Institute be provided, at state expense, after Clifford completed the academic year in which he attained the age of twenty-one. The complaint alleged that the failure to complete the hearing in 45 days constituted the denial of a free appropriate education during the hearing process. In October 1986, the Burrs filed an amended complaint in which they alleged, for the first time, that the Commissioner had improperly failed to treat the hearing officer's decision as final. A. 150. Respondent demanded two

additional years of education at the Institute, at State expense, after he attained the age of twenty-one. A. 151-52.

The Commissioner moved to dismiss the amended complaint on the ground that an award of compensatory education after the age of twenty-one, to redress a claim of past deprivation or past procedural violations, was not authorized by the statute and was barred by the eleventh amendment. The Commissioner argued that his decision accorded with the EHA, which expressly limits the right to a free appropriate public education to children between the ages of three and twenty-one. 20 U.S.C. § 1412(2)(B); N.Y. Educ. Law §§ 3202, 4401(1). Plaintiff cross-moved for summary judgment.[5]

On November 9, 1987, the district court granted the Commissioner's motion to dismiss the amended complaint and denied respondent's cross-motion for summary judgment. S. App. at 32a. The court ruled that pursuant to the explicit and unambiguous language of 20 U.S.C. § 1412(2)(B) and N.Y. Educ. Law §§ 3202, 4401(1), there was no right under the EHA or state education law to a free appropriate public education after the age of twenty-one. Respondent had not been aggrieved by the Commissioner's decision upholding Clifford's placement at the Institute, and did not appeal from that portion of the decision, but rather sought only to reverse the Commissioner's decision denying him additional education after the age of twenty-one. The district court, relying on the statute, held that because the Act did not create a substantive right to free education past the age of twenty-one the procedural protections of the EHA

[5] In opposing the cross-motion for summary judgment, the Commissioner contested, *inter alia*, respondent's claim that Clifford was without education during the administrative process. Except for a brief period, the COH had provided Clifford with home instruction in accordance with his IEP during the administrative proceedings. S. App. at 80a; A. 160, 246, 255-57, 259. Home instruction can be an adequate form of free appropriate public education, N.Y. Educ. Law § 4401(2)(a); *Smrcka v. Ambach*, 555 F. Supp. 1227, 1233 (E.D.N.Y. 1983), and no finding has been made that the home instruction provided respondent was not appropriate.

could not and did not extend to a party claiming deprivation of such a right. 20 U.S.C. § 1415(b)(1)(E) & (2), S. App. at 30a-31a. Accordingly, there was no basis for Clifford's claim that the Commissioner's decision must be vacated as in conflict with the procedural requirements of the EHA. *Id.*

The district court held that, in addition, the court itself could not award the compensatory education sought by respondent because such relief was indistinguishable from the retroactive relief sought in *Edelman v. Jordan*, 415 U.S. 651, 666 (1974), and thus was barred by the eleventh amendment. S. App. at 31a-32a. The court distinguished *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359 (1985), and *Miener v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986), on the ground that they did not involve awards against state defendants and therefore did not raise an issue under the eleventh amendment. S. App. at 32a.

Following entry of an order addressing respondent's claim for administrative attorneys' fees, the district court entered a Rule 54(b) judgment as to all of respondent's claims against the Commissioner without resolving respondent's claim for administrative level attorneys' fees against the Institute.

D. *Proceedings In The Court Of Appeals*

Respondent appealed both of the district court's orders to the United States Court of Appeals for the Second Circuit. The Second Circuit dismissed respondent's appeal of the district court's decision denying administrative level attorneys' fees for lack of an adequate statement of reasons for entering a Rule 54(b) judgment. S. App. at 6a-7a. However, it exercised jurisdiction over the appeal from the district court's order sustaining the Commissioner's decision denying Clifford additional years of education after the age of twenty-one. S. App. at 7a-8a.

The court reversed the judgment of the district court, ruling that the EHA permits an award of additional years of education after a child reaches the age of twenty-one if the child was deprived of a free appropriate public education between the

ages of three and twenty-one. S. App. at 14a, relying upon 20 U.S.C. § 1415. The court of appeals ruled that Clifford had been deprived of such an education because the impartial hearing and review had taken longer than the time specified by federal and state regulations, see 34 C.F.R. § 300.512; 8 N.Y.C.R.R. § 200.5(c) (10), and because the Commissioner's review of the decision of a hearing officer designated by the SED violated the impartiality and finality requirements of the EHA. 20 U.S.C. § 1415(b)(2), (c) and (e) (1), (e)(2).

In deciding that the Commissioner's review did not satisfy the impartiality requirement of 20 U.S.C. § 1415(b)(2), the court did not cite any specific evidence of bias or partiality. The court instead relied on the Third Circuit's decision in *Muth v. Central Bucks School District*, 839 F.2d 113 (3d Cir.), *rev'd sub nom. Dellmuth v. Muth*, 491 U.S.____, 109 S. Ct. 2397 (1989), and the Senate Conference Report upon which the Third Circuit relied. S. Conf. Rep. No. 455, 94th Cong. 1st Sess. 49, reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1502. The report stated that "no hearing may be conducted by an employee of the State or local educational agency involved in the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings and individuals conducting a review of the local due process hearing."

The court of appeals held that the finality provision of the EHA, 20 U.S.C. §§ 1415(e)(1) and (e)(2), also prevented the Commissioner from reviewing the decision of the hearing officer because the hearing officer had been designated by the SED. The Commissioner's review was performed pursuant to 8 N.Y.C.R.R. § 200.7(d)(1), a state regulation which was part of New York's State Plan approved by the United States Department of Education. 20 U.S.C. § 1413; New York State Plan for the Education of Children With Handicapping Conditions, July 1, 1983 to June 30, 1986.

The court of appeals found that the procedural violations warranted a vacatur of the Commissioner's decision and a reinstatement of the hearing officer's direction that the State

pay for Clifford's education at the Institute beyond the maximum age specified by the statute. The court acknowledged that the statutory language explicitly limited the right to a free appropriate public education to children between the ages of three and twenty-one. S. App. at 14a, citing 20 U.S.C. § 1412 (2)(B). Nevertheless, it held that "in some circumstances", such as those presented by the *Burr* hearing, the scope of the remedy could extend beyond a statutory classification explicitly defined by Congress. S. App. at 14a-15a.

Without resolving the question presented in *Muth v. Central Bucks School Dist.*, 839 F.2d 113 (3d Cir.), *rev'd sub nom. Dellmuth v. Muth*, 491 U.S. ____, 109 S. Ct. 2397 (1989), of whether, in enacting the EHA, Congress had abrogated the eleventh amendment immunity of the states, the Second Circuit held that the award of compensatory education would, in any event, not violate the eleventh amendment. It stated that it was merely vacating the Commissioner's decision and thereby reinstating the ruling of a state designated hearing officer who was himself not constrained by the eleventh amendment. Moreover, the court stated, the "mandatory injunction awarded Clifford in this case is purely prospective in nature and any effect on the state treasury is ancillary to such relief and therefore permissible despite the eleventh amendment." S. App. at 17a.

The court's judgment, reversing the district court's order and remanding to that court with instructions to vacate the Commissioner's decision and reinstate the hearing officer's decision, was entered on December 12, 1988. S.App. at 17a.

E. *Proceedings In This Court*

Commissioner Sobol petitioned this Court for a writ of certiorari to review the Second Circuit's judgment. No. 88-1493 (filed on March 10, 1989). After issuing its opinion in *Dellmuth v. Muth*, 491 U.S. __, 109 S. Ct. 2397 (1989), holding that Congress had not abrogated the eleventh amendment when it enacted the Education of the Handicapped Act, the Court granted certiorari in this action, vacated the Second Circuit's judgment and remanded for reconsideration in light of *Dellmuth*. *Sobol v. Burr*, 491 U.S. __, 109 S. Ct. 2397, App. at 7a.

F. *Proceedings On Remand To The Second Circuit*

The Second Circuit vacated its judgment on August 3, 1989, pursuant to this Court's mandate. See App. at 5a to 6a. On October 27, 1989, after receiving letter briefs from the parties, it issued a brief opinion reinstating the judgment. App. at 1a to 4a. The Court of Appeals stated that *Dellmuth* did not affect its holding because its prior judgment had not been based on a ruling that Congress abrogated the eleveventh amendment. App. at 3a, S. App. at 16a. The Court of Appeals stated that its two rationales for the relief it awarded were not undermined by *Dellmuth*. 888 F.2d at 258-259, S. App. at 3a to 4a. Accordingly, the court reaffirmed its prior judgment. App. at 4a.

Reasons for Granting the Writ

The Court of Appeals' Judgment Is Contrary To The Eleventh Amendment Bar Against Compensatory Awards Payable Out Of The State Treasury For Past Violations Of A Federal Right.

A. *The Eleventh Amendment Bar Is Not Avoided By The Court Of Appeals' Characterization Of Its Judgment As Prospective In Nature*

This Court should grant certiorari to review the Second Circuit's reinstatement, on remand, of its vacated judgment. The Court of Appeals erred in characterizing the mandatory injunction requiring the provision of an additional year of compensatory education for Clifford Burr as prospective relief which is not barred by the eleventh amendment. Its holding on remand is in conflict with the decision of this Court in *Dellmuth v. Muth*, *Edelman v. Jordan* and other decisions embodying the established eleventh amendment jurisprudence of this Court. It is also inconsistent with decisions of the Eighth and Ninth Circuits. *Alexopulos v. San Francisco School Dist.*, 817 F.2d 551, 553 (9th Cir. 1987); *Alexopulos v. Riles*, 784 F.2d 1408, 1411 (9th Cir. 1986); *Miener v. State of Missouri*, 673 F.2d 969, 982 (8th Cir.)

("*Miener I*"), *cert. denied*, 459 U.S. 909 (1982)[6]. *See also Gary A. v. New Trier High School Dist. No. 203*, 796 F.2d 940 (7th Cir. 1986)(tuition reimbursement award against state barred by the eleventh amendment).

The purpose of the compensatory education award was to provide equitable restitution to Clifford Burr to compensate him for an alleged deprivation of benefits under the EHA. This is precisely the type of retrospective injunction which *Edelman v. Jordan*, 415 U.S. 651 (1974), held was barred by the eleventh amendment. The *Edelman* injunction, requiring equitable restitution of public assistance benefits, would also have required present action by the defendants but was nonetheless held not to be a prospective injunction. *Id.* at 665. Only an injunction to remedy an ongoing violation of a federal right can properly be characterized as a prospective injunction and therefore escape the eleventh amendment prohibition. See *Pennhurst State School & Hospital v. Halderman*, 465 U.S.89, 102-103 (1984); *Ex parte Young*, 209 U.S. 123 (1908). As the district court correctly recognized, the relief sought by respondent was a backward-looking injunction, awarding relief for a past deprivation, not an injunction to remedy an ongoing violation of a federal right. S. App. at 31a-32a.

The Court of Appeals here did not find the Commissioner to be engaged in any ongoing violation of Clifford's federal rights. S. App. at 5a-6a. The relief it ordered was intended solely to redress a past wrong and will require the expenditure of funds out of the state treasury. See N.Y. Educ. Law § 4207(4). It thus cannot be characterized as "prospective only". See *Green v.*

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[6] The later decision of the Eighth Circuit in *Miener v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986) ("*Miener II*") was rendered after the dismissal of the state defendants on eleventh amendment grounds had been affirmed in *Miener I*, 673 F.2d 969 (8th Cir. 1982). Therefore, the *Miener II* court had no occasion to address the eleventh amendment in its dicta discussing compensatory education. *Miener v. State of Missouri*, 800 F.2d at 752. The *Miener II* court made no award of compensatory education but merely stated that if the plaintiff could prove a violation of the EHA on remand, she might be entitled to a compensatory education award against the local defendants. 800 F.2d at 751.

Mansour, 474 U.S. 64, 70 (1985)(declaratory, injunctive and notice relief violate the eleventh amendment where there is no ongoing violation of federal law but only an alleged past violation of federal law).

The eleventh amendment does not permit the imposition of a compensatory education award against the State for past procedural violations. Whether the award is in the form of one year's tuition reimbursement as in *Dellmuth*, or one year's tuition at state expense after the age of twenty-one is immaterial. Both are federal court judgments against the State compensating a plaintiff, in the form of money, for past procedural violations and are barred by the eleventh amendment. *See Papasan v. Allain*, 478 U.S. 265, 278 (1986) (relief to compensate for past violations of federal law is barred by the eleventh amendment even if "styled as something else").

It is the practical effect of an exercise of federal judicial power which determines whether the federal court's order violates the eleventh amendment. *Green v. Mansour*, 474 U.S. at 73; *Edelman v. Jordan*, 415 U.S. at 664-65. The *Green* Court's refusal to permit a declaratory judgment was based on the potential indirect effect of the judgment, which, by its terms, did not require the payment of money by the State. However, the declaratory judgment's effect was similar to "a full fledged award of damages or restitution" . . . "prohibited by the Eleventh Amendment." *Green v. Mansour*, 474 U.S. at 73.

In *Papasan*, the plaintiffs argued that they suffered from the continuing effects of a past breach of a trust agreement and that the consequent continuing obligation under federal law created an exception to eleventh amendment immunity. 478 U.S. at 279. The *Papasan* Court rejected that argument and held that compensation for a past action was barred by the eleventh amendment, stating "the distinction between a continuing obligation on the part of the trustee and an ongoing liability for past breach of trust is essentially a formal distinction of the sort we rejected in *Edelman*." 478 U.S. at 280.

Both the prior judgment of the Court of Appeals and the Third Circuit's judgment in *Dellmuth* are barred by the eleventh amendment, since both would have required that money be paid from the State treasury for an alleged past wrong. As the Ninth Circuit has held, a parent's request for compensatory education beyond the age of 21 is "virtually identical to a request for money damages measured by the cost of the educational services provided." *Alexopulos v. San Francisco School Dist.*, 817 F.2d 551 at 553 (9th Cir. 1987) (citing *Alexopoulos v. Riles*, 784 F.2d 1408, 1412 (9th Cir. 1986)). *See also Miener v. State of Missouri*, 673 F.2d 969, 982 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982) (compensatory education and tuition reimbursement indistinguishable for eleventh amendment purposes).

The Court of Appeals, in its reinstated judgment, cited to *Edelman v. Jordan*, 415 U.S. at 668, for the proposition that the ancillary effects on the state treasury of compliance with an injunction do not violate the eleventh amendment. 863 F.2d at 1079. S. App. at 17a. However, the "ancillary effects" exception to the eleventh amendment is limited to the effects of compliance with an injunction that is intended to redress a present, and ongoing, violation of federal law. *Green v. Mansour*, 474 U.S. at 71; *Edelman v. Jordan*, 415 U.S. at 667-668. The Second Circuit did not find that the Commissioner was engaged in any present violation of the law, but based its award of an extra year of tuition at the Institute, after Clifford Burr reaches the age of 21, solely on procedural lapses and delays which occurred between 1984 and 1986, two to four years prior to its judgment. That the relief awarded is not prospective in nature for eleventh amendment purposes is demonstrated by the following language from the *Edelman* decision:

> But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications

> were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of defendant state officials.

Edelman v. Jordan, 415 U.S. at 668. The judgment of the Court of Appeals in *Burr* was not an *Ex parte Young* injunction, 209 U.S. 123, 160 (1908), to remedy a present failure to comply with federal law, but an award of equitable restitution for a past breach of a legal duty. It is thus barred by the eleventh amendment since it is not "ancillary" to any permissible remedy. *Edelman v. Jordan*, 415 U.S. at 667-68.

Furthermore, the reinstated judgment cannot be justified by the argument urged by respondent below, but not addressed by the court of appeals, that *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*") provided authority for its judgment. Prior to the Court's decision in *Milliken II*, the district court had entered an injunction requiring the desegregation of the Detroit schools, which served the purpose of ending a present violation of the equal protection clause and, therefore, was within the doctrine of *Ex parte Young*, 209 U.S. 123, 167 (1903). *See Bradley v. Milliken*, 338 F. Supp. 582, 592-94 (E.D. Mich. 1971). Some six years after the original injunction in *Milliken*, the district court entered an order requiring the state to share funding of some remedial education programs in some Detroit schools. The order was designed to further the purposes of the underlying desegregation injunction, i.e., to end a system of unequal education and was ancillary to that injunction. *See Kelly v. Metropolitan Co. Bd. of Educ.*, 836 F.2d 986, 992 (6th Cir. 1987)

(citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984)).

The students who had graduated from the Detroit schools before the remedial education injunction were not offered additional post-graduate programs to compensate them for inadequate education they had received because the schools had been racially segregated. Rather, the remedial programs approved by this Court in the *Milliken II* class action were designed to help those students who were, at that time, attending the Detroit schools. In contrast, the judgment below was *not* ancillary to an injunction necessary to end a present violation of the equal protection clause. Instead, it was designed solely to compensate an individual plaintiff for past violations of law.

This Court has not extended *Milliken II* beyond the specific context presented by that action. *Kelly v. Metropolitan Co. Board of Educ.*, 836 F.2d 986, 991-92; *Clark v. Cohen*, 794 F.2d 79, 89-92 (3d Cir.) (Becker, J. concurring), *cert. denied*, 479 U.S. 962 (1986). Both prior and subsequent decisions of the Court are inconsistent with a broad construction of *Milliken II's* "continuing effects" exception to eleventh amendment immunity *See e.g., Welch v. Texas Dep't of Highways*, 483 U.S. 468 (1987); *Green v. Mansour*, 474 U.S. 64 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 102-03 (1984); *Quern v. Jordan*. 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Louisiana v. Jumel*, 107 U.S. 711 (1882). Those decisions all recognize that a federal court may not compensate a party for a state's historical violation of his rights.

The fact that the judgment requires the payment of state funds for an individual who is beyond the age of twenty one and thus no longer substantively eligible under the EHA for a free appropriate public education makes it even clearer that the award is barred by the eleventh amendment. As the Second Circuit recognized, the class afforded substantive rights by the statute is defined as those children between the ages of three and twenty-one. S. App. at 14a, 20 U.S.C. § 1412(2)(B) and N.Y. Educ. Law § 4401(1). Thus, an award of an additional year of education for an individual who is past the age of twenty-one does not

enforce any ongoing right under a federal statute. *Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592, 601 (1988); *Susan R.M. v. Northeastern Independent School District*, 818 F.2d 455 (5th Cir. 1987); *Alexopulos v. San Francisco School Dist.*, 817 F.2d 551 (9th Cir. 1987); *Wexler v. Westfield Board of Education*, 784 F.2d 176, 183 (3d Cir.), *cert. denied*, 479 U.S. 825 (1986); *Alexopulos v. Riles*, 784 F.2d 1408, 1413 (9th Cir. 1986); *Gallagher v. Pontiac School Dist.*, 807 F.2d 75, 78 (6th Cir. 1986); *Rettig v. Kent City School District*, 539 F. Supp. 768, 772 (N.D. Ohio 1981); *aff'd in part and vacated in part*, 720 F.2d 463 (6th Cir. 1983), *cert. denied*, 467 U.S. 1201 (1984); *Adams Central School Dist. No. 090, Adams County v. Deist*, 214 Neb. 307, 334 N.W.2d 775, *cert. denied*, 464 U.S. 893 (1983).[7] In the absence of an explicit and unambiguous statutory provision for education after the age of twenty-one, an award against the State of an additional year of education is tantamount to a pure damage award, and thus is directly barred by the eleventh amendment.

B. *The Eleventh Amendment Bar Is Not Avoided By The Second Circuit's Vacatur Of The Commissioner's Order And Its Reinstatement Of A State-Designated Hearing Officer's Award Of Compensatory Education*

In its judgment, the Second Circuit held that the eleventh amendment was not implicated by its vacatur of the Commissioner's decision and its reinstatement of the decision of the hearing officer, because it was the impartial hearing officer, a state officer, who had initially ordered the compensatory education. The distinction does not avoid the eleventh amendment bar. It is solely by virtue of the Court of Appeals judgment, a federal court order, that the State is directed to finance compensatory education.

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[7] But see *Jefferson County Board of Education v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988) (awarding two additional years of education after the age of twenty-one to be provided by the local school district, not the state).

When the practical effect of an order is to require the payment of money from the state treasury to remedy a past wrong, the nature of the order's wording is irrelevant for eleventh amendment purposes. *Edelman*, 415 U.S. at 664-66. *See also Papasan v. Allain*, 478 U.S. at 278. Formal distinctions and "end runs", will not serve to overcome the constitutional principle embodied in the eleventh amendment. *Papasan v. Allain*, 478 U.S. at 280; *see supra* at 12-14. The careful phrasing of the judgment does not avoid its inevitable result, which is that, pursuant to a federal court order, money will be paid from the state treasury, pursuant to N.Y. Educ. Law § 4207 (4), to compensate respondent for past procedural defects in the administrative process. The effect on the state treasury of the Second Circuit's order is considerably more direct than the potential effect of the declaratory judgment held to violate the eleventh amendment in *Green v. Mansour*, 474 U.S. at 72-73. This Court should grant certiorari and reverse the Court of Appeals' reinstatement, on remand, of its prior judgment.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the judgment of the Court of Appeals.

Dated: New York, New York
January 3, 1990

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 116—August Term 1988

Submitted: October 18, 1988 Decided: October 27, 1989

Docket No. 88-7275

CLIFFORD BURR, by his Parents and Next Friends, KENNETH BURR, BETTY BURR,

Plaintiffs-Appellants,

—against—

THOMAS SOBOL, As Commissioner of the New York State Education Department,

Defendant-Appellee.

Before:

FEINBERG, NEWMAN and GARTH,*

Circuit Judges.

* Honorable Leonard I. Garth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Prior opinion of this court reinstated compensatory education beyond age twenty-one for severely handicapped youth, 863 F.2d 1071 (2d Cir. 1988). The Supreme Court vacated that judgment to allow further consideration in light of its intervening opinion in Dellmuth v. Muth, 109 S. Ct. 2397 (1989). Upon reconsideration, we reaffirm our prior decision.

ELLEN M. SAIDEMAN, New York, NY (New York Lawyers for the Public Interest, of Counsel), *for Plaintiff-Appellant*.

BRUCE LOREN, Legal Intern, Brooklyn, NY (BLS Legal Services Corp., Federal Litigation Program, Luzmina Gonzales, Legal Intern, Kathleen A. Sullivan, of Counsel), *for Plaintiff-Appellant*.

MARTHA O. SHOEMAKER, New York, NY (Assistant Attorney General of the State of New York, Robert Abrams, Attorney General of the State of New York, Stuart Kaufman, Legal Intern, on the brief, of Counsel), *for Defendant-Appellee*.

BROWN & WOOD, New York, NY (Peter Tufo, Anita Fisher Barrett, of Counsel), *for The New York Institute for the Education of the Blind, Amicus Curiae*.

PER CURIAM:

The background of this case is described in the prior opinion of this court, reported at 863 F.2d 1071 (2d Cir. 1988).[1] It is before us again because the judgment of this court was vacated by the Supreme Court, Sobol v. Burr, 109 S. Ct. 3209 (1989). In our opinion, we reinstated an award of compensatory education beyond age twenty-one to a handicapped youth because he had been denied his right to a free, appropriate education during delays in the statutorily mandated hearing process. Burr, 863 F.2d at 1078. A New York State hearing officer had originally awarded the youth such relief. Id. After our opinion was issued, the Supreme Court decided Dellmuth v. Muth, 109 S. Ct. 2397 (1989), which held that the Education of the Handicapped Act, 20 U.S.C. § 1400 et seq., did not abrogate the states' Eleventh Amendment immunity. The Court subsequently vacated our judgment in this case and remanded "for further consideration" in light of *Muth*. Burr, 109 S. Ct. at 3209. We thereafter asked for, and received, briefs from the parties on the effect of *Muth* on our decision in *Burr*.

We did not base our holding in *Burr* on the abrogation of the states' Eleventh Amendment immunity because we did not believe it was necessary to reach that question in that case. See Burr, 863 F.2d at 1079. We concluded, for two alternative reasons, that the amendment was not violated. First, our decision merely vacated a decision of the Commissioner of the New York State Education Department and reinstated the decision of a state hearing officer,

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1 The prior opinion was captioned Burr v. Ambach. Because Thomas Sobol is now Commissioner of the New York State Education Department, he has been automatically substituted for the former Commissioner, Gordon Ambach. See Fed. R. App. P. 43(c)(1).

whose award of relief is not limited by the Eleventh Amendment. Second, the relief granted the handicapped youth was prospective in nature, and any effect on the state treasury would be ancillary to such relief and therefore permissible despite the Eleventh Amendment. Id. We have considered the effect of *Muth*, and we continue to believe that the Eleventh Amendment is not violated in this case. We therefore reaffirm our prior holding.

United States Court of Appeals
for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Third day of August, one thousand nine hundred and eighty-nine.

Present: Hon. Wilfred Feinberg, C.J.
Hon. Jon O. Newman, C.J.
Hon. Leonard I. Garth, C.J.

Circuit Judges,

CLIFFORD BURR, By his Parents and Next Friends, KENNETH BURR, BETTY BURR, *Plaintiffs-Appellants,*	
-v-	
GORDON AMBACH, As Commissioner of the New York State Education Department, *Defendent-Appellee.*	88-7275

The action herein having been taken to the Supreme Court of the United States by writ of certiorari and a certified copy of the judgment of the said court having been received and filed, vacating the judgment of this court with costs and remanding the said action to this court for further consideration in light of Dellmuth v. Muth 491 U.S.— (1989) pursuant to the opinion of the Supreme Court of the United States.

UPON CONSIDERATION THEREOF, it is ordered that the judgment of this court of December 12, 1988 and the mandate issued therein be and they hereby are vacated in accordance with the opinion of the Supreme Court.

ELAINE B. GOLDSMITH,
Clerk

/s/ Edward J. Guardaro

By: EDWARD J. GUARDARO,
Deputy Clerk

Supreme Court of the United States

No. 88-1493

Thomas Sobol, Commissioner, New York State Department of Education,

Petitioner,

v.

Clifford Burr, etc.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Dellmuth v. Muth*, 491 U.S. ____ (1989).

IT IS FURTHER ORDERED that the petitioner, Thomas Sobol, Commissioner, New York State Department of Education, recover from Clifford Burr, etc., Two Hundred Dollars ($200.00) for his costs herein expended.

June 26, 1989

Clerk's costs: $200.00

89-1091

No. 89-

FILED
JAN 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS SOBOL, as Commissioner of the New York State Education Department,

Petitioner,

– against –

CLIFFORD BURR, by his Parents and Next Friends, KENNETH BURR, BETTY BURR,

Respondent.

SUPPLEMENTARY APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 116—August Term 1988

Argued: October 3, 1988 Decided: December 12, 1988

Docket No. 88-7275

CLIFFORD BURR, by his Parents and Next Friends, KENNETH BURR, BETTY BURR,

Plaintiffs-Appellants,

—against—

GORDON AMBACH, As Commissioner of the New York State Education Department,

Defendant-Appellee.

Before:

FEINBERG, *Chief Judge,*
NEWMAN and GARTH,* *Circuit Judges.*

Appeal from two orders of the United States District Court for the Southern District of New York, Robert L.

* Honorable Leonard I. Garth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Carter, J., one affirming the New York State Commissioner of Education's decision refusing to grant appellant compensatory education under the Education of the Handicapped Act. and the other declining to award attorney's fees to appellant from the Commissioner.

Reversed in part and dismissed in part.

ELLEN M. SAIDEMAN, New York, NY (New York Lawyers for the Public Interest, of Counsel), *for Plaintiff-Appellant.*

BRUCE LOREN, Legal Intern, Brooklyn, NY (BLS Legal Services Corp., Federal Litigation Program, Luzmina Gonzalez, Legal Intern, Kathleen A. Sullivan, of Counsel), *for Plaintiff-Appellant.*

MARTHA O. SHOEMAKER, New York, NY (Assistant Attorney General of the State of New York, Robert Abrams, Attorney General of the State of New York, Stuart Kaufman, Legal Intern, on the brief, of Counsel), *for Defendant-Appellee.*

BROWN & WOOD, New York, NY (Peter Tufo, Anita Fisher Barrett, of Counsel), *for The New York Institute for the Education of the Blind, Amicus Curiae.*

FEINBERG, *Chief Judge*:

Clifford Burr, by his parents and next friends Kenneth Burr and Betty Burr, appeals from two orders of the United States District for the Southern District of New York, Robert L. Carter, J., dismissing plaintiff's claims under the Education of the Handicapped Act, 20 U.S.C. § 1400 et seq. (hereafter "EHA or "the Act"), and denying recovery of attorney's fees from the New York State Commissioner of Education, defendant in this case. For reasons given below, with respect to the first order, we reverse the judgment of the district court; with respect to the second order, we dismiss the appeal.

Background

Appellant Clifford is a severely handicapped young man, now 20 years old. Until four years ago, Clifford attended a private school for blind and retarded youngsters at public expense, in accordance with the state's responsibility under the EHA to provide a "free appropriate public education" to all handicapped youngsters up to the age of twenty-two. See 20 U.S.C. § 1412(1). The school closed in June 1984. Pursuant to his statutory obligation to place handicapped students in schools, N.Y. Educ. L. § 4201(2)(c), the Commissioner referred Clifford to the New York Institute for the Education of the Blind (hereafter "the Institute"), a state-supported school. The Institute rejected Clifford, claiming that Clifford would not benefit from its program because he needed "habilitation," or training in life skills, for the mentally retarded and had no academic potential. In notifying the Burrs of Clifford's disqualification for its school, the Institute

failed to mention its Frampton Hall program for those with multiple handicaps.

Thereafter, Clifford's parents requested a hearing under 20 U.S.C. § 1415(b)(2), to review the Institute's rejection. The hearing officer, who was designated by the New York State Department of Education pursuant to 8 N.Y.C.R.R. § 200.7(d), decided that Clifford should be placed in the Institute. However, the hearing officer took 13 months from the time the Burrs requested a hearing to reach a decision, despite federal and state regulations requiring that hearings be completed much more promptly. Attributing fault for the delay to himself as well as to both parties, the hearing officer awarded Clifford one and one-half years of compensatory education beyond age twenty-one to make up for the education lost from the time of the closing of Clifford's school in June 1984 until the hearing officer's decision on January 27, 1986. The hearing officer notified both sides of their right to appeal his decision to the Commissioner. See 8 N.Y.C.R.R. § 200.7(d)(1) and 200.5(d).

The Institute appealed to the Commissioner, and Clifford remained out of school during the appeal. On May 20, 1986, the Commissioner affirmed the hearing officer's decision to place Clifford at the Institute, but reversed the award of compensatory education because the EHA does not authorize an award of compensatory education beyond the age of 21. Clifford was admitted to the Institute in June 1986, and is presently a member of its Frampton Hall Program.

Pursuant to 20 U.S.C. § 1415(e)(2), Clifford appealed to the district court in September 1986, claiming that the delays in the hearing process violated his right under the Act to a due process hearing, and caused him to lose

nearly two full academic years of "free appropriate public education." Clifford also requested attorney's fees from the Commissioner pursuant to 20 U.S.C. § 1415(e)(4)(B). The district court, in an opinion dated November 9, 1987, granted the Commissioner's motion to dismiss the due process claim. In December 1987, plaintiff filed a notice of appeal to this court challenging that decision, although no judgment had then been entered. The parties entered into a stipulation on February 2, 1988, which was so ordered by the court, withdrawing the appeal without prejudice to reinstatement under the conditions set forth in the stipulation. On March 9, 1988, the district court denied plaintiff's claim against the Commissioner for attorney's fees, holding that the Institute—not the Commissioner—was the adverse party in the administrative proceedings. 683 F. Supp. 46 (S.D.N.Y. 1988). In that opinion, the district judge also granted plaintiff leave to file an amended complaint seeking attorney's fees from the Institute for services in the administrative proceedings, and directed entry, under Rule 54(b) of the Federal Rules of Civil Procedure, of a final judgment for the Commissioner on all of plaintiff's claims against him. That judgment was entered on March 18, 1988, and appellant filed a new notice of appeal shortly thereafter.

Jurisdiction

The first question that we must decide is whether we have jurisdiction to hear both aspects of this case. When we first considered the case, we thought that, because of the complicated procedural history set forth above, there might be a jurisdictional problem based on lack of timeliness with respect to the due process issues decided in the November 9 order. We therefore asked the parties to brief

those issues as well as the propriety of the Rule 54(b) certification. After further consideration, however, we conclude that we do have jurisdiction over the due process issues.

The question whether we have jurisdiction over the attorney's fees claim requires further discussion. The Commissioner argues that the district court abused its discretion in entering judgment with respect to plaintiff's claim for fees against him and in certifying for appeal the attorney's fees issue pursuant to Rule 54(b). Accordingly, the Commissioner asks us to dismiss that portion of the appeal. A district court's exercise of discretion in certifying a claim under Rule 54(b) is reviewable by this court, Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956), and if the district court abused its discretion, then this court is without jurisdiction to hear the appeal, Brunswick Corp. v. Sheridan, 582 F.2d 175, 183 (2d Cir. 1978). One requirement of a proper Rule 54(b) certification is a statement of reasons explaining why "there is no just reason for delay"; mere repetition of the conclusory language from the Rule will not suffice where the justification for the certificate is not apparent. See Arlinghaus v. Ritenour, 543 F.2d 461, 463-64 (2d Cir. 1976); Gumer v. Shearson, Hammill & Co., Inc., 516 F.2d 283, 286 (2d Cir. 1974). In this case, even though the attorney's fees issue against the Institute will still be tried in the district court, the district judge gave no adequate explanation as to why the fees issue as to the Commissioner should be certified.

We have often said that certification under Rule 54(b) should not be made routinely or as an accommodation to counsel. See Brunswick, 582 F.2d at 183. If plaintiff would suffer hardship or injustice if he had to try his claim against the Institute before appealing denial of his claim

for fees against the Commissioner, then certification was appropriate. See Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 941 (2d Cir. 1968). But we do not see how deferral of an appeal regarding the attorney's fees claim against the Commissioner harms plaintiff. Plaintiff is limited to a single recovery of attorney's fees in this case; if he recovers from the Institute, then there will be no need for an appeal against the Commissioner. Where there is a single claim for relief, certification under Rule 54(b) is improper, Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 743 (1976); Rabekoff v. Lazere & Co., 323 F.2d 865, 866 (2d Cir. 1963), and in this case, plaintiff has only one claim for attorney's fees, and will be satisfied if he prevails against either party. As this court said in *Arlinghaus*, "the mere existence of multiple parties and the dismissal of some do not afford sufficient warrant for entry of final judgment under Fed. R. Civ. P. 54(b) . . ." 543 F.2d at 463. A decision now on plaintiff's appeal on the claim against the Commissioner for fees may prejudice the Institute, which is before us only as amicus curiae, and not as a party. Gumer, 516 F.2d at 286. It would be most economical and fair for us to wait and determine the respective rights of all three interested parties at one time. For all of these reasons, we believe that the district judge exceeded his discretion in concluding that the attorney's fees issue vis-a-vis the Commissioner should come to this court before the district court determines the same issue against the Institute. We agree with the Commissioner that the Rule 54(b) certification was improvidently granted in this respect, and we lack jurisdiction to entertain the fees order.

On the other hand, we do have jurisdiction to decide the merits of the due process claim and the appropriate remedy for a violation. There is no reason to delay the appeal

of the order concerning the compensatory education issue. That issue is completely separate from the attorney's fees claim to be litigated against the Institute in the district court. In addition, Clifford and his family would suffer serious hardship if the compensatory education claim were not determined now because they would not know until after the fee litigation ends if they must find adult placement for Clifford in anticipation of his fast-approaching twenty-first birthday. Even if the attorney's fees issue is eventually appealed to this court, entertaining an appeal on the merits of the due process claim now will not waste judicial resources because there will be no duplication of the substantive issues raised in that appeal on a later appeal concerning fees. We therefore turn to the merits of the due process claim.

Discussion

Appellant claims that his due process rights were violated by the delays in deciding his case, and argues that he should receive compensatory education to make up for educational time lost as a result of such delays. He also contends that the appeal taken by the Institute to the Commissioner conflicted with the EHA, and was therefore invalid. The Commissioner responds that the delays did not constitute a due process violation and that the appeal was proper, that remedies for violations of the EHA cannot continue beyond a child's twenty-first birthday and that compensatory education is an inappropriate remedy here, in any event, because it is barred by the eleventh amendment.

Turning to Clifford's argument of undue delay, it is unclear whether he is claiming only a violation of the EHA or a constitutional claim of denial of procedural due pro-

cess, or both. Since the statute refers to the hearing that Clifford received as an "impartial due process hearing," appellant's merger of the two concepts is understandable. Nevertheless, a statutory violation does not necessarily offend the Constitution. In addition, following well-recognized doctrine, we will consider the constitutional claim only if it is necessary to do so. As will be seen below, it is not.

Federal regulations pursuant to the EHA state that the parents of a handicapped child have a right to a determination by a hearing officer within 45 days after receipt of a request for a hearing. 34 C.F.R. §§ 300.506 and 300.512. Despite this clear command, the hearing regarding Clifford did not even commence until over four months after the request for it, and the hearing officer's decision came over a year after the request. Obviously, the federal regulations were grossly violated in this case.[1] As the Commissioner noted, fault for the delay was completely attributable to the hearing officer, and appellant should not be forced to suffer the consequences of it. In most cases, a lengthy hearing would not be as damaging to a handicapped child as it was in this case, because normally the "stay-put" provision of the Act, 20 U.S.C. § 1415(e)(3), would keep a child in his prior placement until proceedings are concluded.[2] In this case, however, Clifford had no

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1 The New York regulations were also violated. 8 N.Y.C.R.R. § 200.5(c)(10) provides:

> The impartial hearing officer shall render a decision, and mail a copy of the decision to the parents and to the board of education, not later than 45 calendar days after the receipt by the board of education of a request for a hearing or after the initiation of such a hearing by the board.

2 The section reads:

> During the pendency of any proceedings conducted pursuant to this section, unless the State of local educational agency and the

prior placement because his former school had closed, and consequently, he was denied an appropriate education during pendency of the procedings, the precise unfortunate result that the "stay-put" provision was designed to prevent. We have no doubt, therefore, that Clifford was injured by the hearing officer's failure to comply with the regulations, and that he has stated a claim cognizable under the Act.

We also believe that Clifford was injured by the extra three-month delay caused by the Commissioner's review of the hearing officer's decision, and that such review itself failed to comply with the requirements of the EHA. The relevant portion of the EHA provides:

§ 1415 Procedural safeguards

. . .

(b)(2) Whenever a complaint has been received . . . the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a

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parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

> local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. . . .
>
> (e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. . . .
>
> (2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States . . . .

Thus, a hearing under this section may be conducted by the "State educational agency" or by a "local educational agency" or an "intermediate educational unit." In the latter two instances, subsection (c) provides for an appeal to the state educational agency, a two-tier administrative review. However, the statute does not provide for such an appeal when the initial determination is made by a hearing officer designated by the state educational agency. When that occurs, subsections (e)(1) and (e)(2) read together provide that the hearing officer's decision is final, a one-tier administrative review. In this case, only a one-tier review was appropriate because Clifford's case was heard by a

hearing officer designated by the state educational agency. Therefore, allowing the Institute to appeal to the Commissioner was contrary to the EHA.

It is true that the New York State regulations at issue in this case provided for an appeal by a party to the Commissioner. 8 N.Y.C.R.R. § 200.7(d)(1) and 200.5(d). However, this court has previously expressed its doubt as to the validity of one aspect of the New York review procedures. In Antkowiak v. Ambach, 838 F.2d 635, 641 (2d Cir.), cert. denied sub nom. Doe v. Sobol, 109 S. Ct. 133 (1988), we said that the Commissioner's review in that case, which subjected the parties to an extra procedural step not required by the EHA, seemed inconsistent with the finality provision of § 1415. It is true that our criticism there was directed at a state regulation allowing the Commissioner to review a decision on his own initiative, even if the parties did not appeal. Nevertheless, that expression of concern over unnecessary review seems applicable here. Cf. Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981), cert. denied, 455 U.S. 946 (1982). In *Helms*, the court said that because of the state board's power to reject the results of the hearing, "the entire system of procedural safeguards is nullified at a single stroke." Id. at 806. Similarly, the United States Department of Education has warned the New York Department of Education that its plan might not be approved if changes were not made, advising the State that: "In order to meet the requirements of the EHA, New York must institute procedures that insure that . . . [w]hen hearings concerning 4201 students are conducted by the [State Educational Agency], the hearing officer's decision is final."

Appeal to the Commissioner was also improper because the statute provides that a proper review at the state level

must be impartial. 20 U.S.C. § 1415(c). The Commissioner does not satisfy the impartiality requirement because he has extensive responsibilities and is integrally involved with the operation of state-supported schools such as the Institute. Indeed, his responsibilities for the Institute are specifically spelled out by statute. See N.Y. Educ. L. § 4201. The Conference Committee on the EHA wrote: "no hearing may be conducted by an employee of the State . . . involved in the education . . . of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings *and individuals conducting a review of the local due process hearing.*" S. Conf. Rep. No. 455, 94th Cong., 1st Sess, 49, reprinted in 1975 U.S. Code Cong. & Admin. News 1425, 1502 (emphasis added). Relying on this legislative history, the weight of authority has supported an interpretation of the impartiality requirement barring employees of the state educational agency from conducting reviews involving state-sponsored schools. See Muth v. Central Bucks School Dist., 839 F.2d 113, 123 (3d Cir.) (citing cases), cert. granted sub nom. Gilhool v. Muth, 109 S. Ct. 52 (1988). But see Victoria L. v. District School Board, 741 F.2d 369 (11th Cir. 1984). For both these reasons, we conclude that the New York procedures in effect during administrative review of this case were not consistent with the Act.

The Commissioner argues that appellant waived his right to object to review by the Commissioner by failing to press the point before him. Normally, exhaustion is required in actions brought under the EHA. See Riley v. Ambach, 668 F.2d 635, 640 (2d Cir. 1981). But, exhaustion of administrative remedies is not necessary where it would be futile. See Honig v. Doe, 108 S. Ct. 592, 606

(1988); Riley v. Ambach, 668 F.2d at 640-41. We are convinced that exhaustion would have been futile in this case. The Commissioner argues to us that duly-passed State regulations required him to review the hearing officer's decision. Under these circumstances, there is no doubt that he would have held that the review procedure was permissible if the issue had been raised before him. We conclude, therefore, that the decision of the Commissioner should be set aside and the decision of the hearing officer reinstated. This, in effect, makes the hearing officer's decision the State's "final administrative decision" under the EHA. See Antkowiak, 838 F.2d at 641. We turn now to the issues raised by the relief ordered by the hearing officer.

As noted above, the hearing officer awarded Clifford one and one-half years of compensatory education to make up, at least in part, for the time that Clifford had wrongfully been denied placement in the Institute. The district judge reversed the award of such relief because he interpreted the protections of the EHA to end at the age of twenty-one, whereas the relief granted by the hearing officer would extend beyond Clifford's twenty-first birthday. Appellant argues that the district court erred in this respect.

It is true that a handicapped child does not have a right to demand public education beyond the age of twenty-one. Nevertheless, we believe that Clifford is entitled to a remedy for deprivation of the right that the statute clearly provided him—a free appropriate education between the ages of three and twenty-one, 20 U.S.C. § 1412(2)(B). Section 1415 of the EHA authorizes a district court to award "such relief as the court determines is appropriate." In some circumstances, the scope of the remedy can extend beyond the scope of the original right. See Swann v.

Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971). "[I]t is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678, 684 (1946) (footnote omitted). And, in School Comm. of the Town of Burlington v. Dept. of Educ., the Supreme Court made clear that "equitable considerations are relevant in fashioning relief." 471 U.S. 359, 374 (1985). We do not believe that Congress intended to create a right without a remedy. If, in this case, we do not allow an award of compensatory education, then Clifford's right to an education between the ages of three and twenty-one is illusory. Clifford cannot go back to his previous birthdays to recover and obtain the free education to which he was entitled when he was younger.

Furthermore, under the EHA a parent can enroll a child in a private placement and then recover the tuition paid by the parent during the proceedings against the school board, if the proceedings ultimately establish that the parent's placement was appropriate. Burlington, 471 U.S. at 369. If that is so, then a child should not be wholly deprived of education because his parents could not afford to pay for an appropriate education at a private school while waiting for the state or local agency to litigate the issue of a proper placement. The Eighth Circuit, in approving the remedy of compensatory education, said, "[w]e are confident that Congress did not intend the child's entitlement to a *free* education to turn upon her parent's ability to 'front' its costs." Miener v. State of Mo., 800 F.2d 749, 753 (8th Cir. 1986) (emphasis in original). Administrative and legal proceedings are often lengthy, and a person who prevails at the end of such proceedings should be able to obtain what the proceedings

establish he was entitled to when they began. Clifford should not lose the education to which he was entitled at the time his parents requested a hearing under the Act because the hearing was protracted. The Institute was mistaken when it decided that its program was inappropriate for Clifford—as the administrative decisions show—and that mistake should not cost Clifford one and one-half years of education to which he was entitled.

Finally, the Commissioner argues that this court cannot award the compensatory education ordered by the hearing officer because such relief is barred by the eleventh amendment. Appellant counters that Congress abrogated the states' eleventh amendment immunity in passing the Act, and that, in any event, the remedy Clifford seeks is purely prospective and thus does not violate the amendment. Although our opinion in Counsel v. Dow, 849 F.2d 731, 736-37 (2d Cir. 1988) indicates receptivity to the argument that the states' eleventh amendment immunity was abrogated by enactment of the EHA, we express no opinion on the issue, and recognize that the circuits are split on it. Compare Muth v. Central Bucks School Dist., 839 F.2d 113, 128 (3d Cir. 1988) with Gary A. v. New Trier High School Dist. No. 203, 796 F.2d 940, 944 (7th Cir. 1986) (per curiam). The Supreme Court has granted certiorari in *Muth* to resolve this conflict. Gilhool v. Muth, 109 S. Ct. 52 (1988). Nevertheless, we believe that it is possible to reinstate the relief fashioned by the hearing officer without addressing the eleventh amendment issue. This panel is merely vacating the decision of the Commissioner, and reinstating the decision of the hearing officer. The hearing officer is a decisionmaker designated by the State and is not constrained by the eleventh amendment. Therefore, we do not implicate the eleventh amendment by expunging the bar to his decision. In addition—although not essential

to our holding—we believe that the mandatory injunction awarded Clifford in this case is purely prospective in nature, and any effect on the state treasury is ancillary to such relief and therefore permissible despite the eleventh amendment. See Edelman v. Jordan, 415 U.S. 651, 668 (1974).

Clifford has been at the Institute since June 1986, and, under the district court's decision, would have remained there until the end of this academic year in June 1989. Although Clifford will turn 21 on December 30, 1988, the hearing officer's decision, which we reinstate here, directs that Clifford remain in the Institute until the end of the 1989-90 school year. We believe that this result best furthers the intent of Congress to provide a free, appropriate education to all handicapped children.

We therefore reverse that part of the judgment that dismissed the due process claim, and remand to the district court with instructions to vacate the decision of the Commissioner and reinstate the decision of the hearing officer. We also dismiss the appeal from that part of the judgment that dealt with the issue of attorney's fees. In view of the extensive delays in this matter, the mandate shall issue one week from the date of this opinion. Appellant may recover his costs related to the appeal of the due process order. No costs are awarded with respect to the appeal of the fees order.

Clifford BURR, by his parents and next friends, Kenneth and Betty BURR, Plaintiffs,

v.

Gordon AMBACH, as Commissioner of the New York State Education Department, Defendant.

No. 86 Civ. 7164 (RLC).

United States District Court,
S.D. New York.

March 9, 1988.

Handicapped student sought attorney fees following his success at administrative level in obtaining placement at special school. The District Court, Robert L. Carter, J., held that student was entitled to recover fees from school, against whom he prevailed at administrative level, but not from Commissioner of Education, who had authority to appoint student to school.

Ordered accordingly.

OPINION

ROBERT L. CARTER, District Judge:

In administrative proceedings before a hearing officer appointed by the New York State Commissioner of Education, plaintiff Clifford Burr challenged the recommendation of the New York Institute for the Education of the Blind ("the Institute") that he not be appointed to its program for the handicapped. The hearing officer directed plaintiff's admission to the Institute's program, and awarded plaintiff a year of free public education to compensate him for the delay in his placement. The Institute appealed both of these decisions to the Commissioner of Education, who upheld plaintiff's admission to the Institute, but reversed the award of compensatory education. Plaintiff brought suit in this court under the Education of the Handicapped Act ("the Act"), 20 U.S.C. §§ 1400-1485, challenging the Commissioner's denial of compensatory education to him. In an opinion dated November 9, 1987, with which familiarity is assumed, the court granted the Commissioner's motion dismissing the amended complaint for failure to state a claim. *Burr v. Ambach*, 86 Civ. 7164 (RLC), slip op. (S.D.N.Y. Nov. 9, 1987) (Carter, J.) [Available on WESTLAW, 1987 WL 19957]. The court noted, however, that plaintiff's claim for attorney's fees in connection with representation at the agency level that culminated in plaintiff's admission to the Institute was still pending.[1] *Id.*, slip op. at 9 nn. 1 & 4.

Shortly before the court issued its opinion, the Commissioner moved for a judgment dismissing the Supplemental Complaint on the pleadings. Plaintiff then moved for summary judgment granting him some $52,000 in attorney's fees. Plaintiff also moves to amend the Supplemental Complaint to name the Institute

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[1] The claim for attorney's fees was brought by way of Supplemental Complaint. The court granted plaintiff leave to file his Supplemental Complaint by Order dated May 15, 1987.

as a party defendant. With regard to the court's previous decision on the claim for compensatory education, plaintiff filed a Notice of Appeal. That appeal was withdrawn without prejudice, however, in the belief that the order appealed from was not final. *Burr v. Ambach*, No. 88-7005 (2d Cir. Jan. 26, 1988) (stipulation). Plaintiff now asks the court to direct the entry of final judgment as to the claim adjudicated in the court's November 9 opinion.

DISCUSSION

Section 615(e)(4)(B) of the Education of the Handicapped Act, 20 U.S.C. § 1415(e)(4)(B), added by the Handicapped Children's Protection Act of 1986, Pub.L. No. 99-372, 100 Stat. 796-98 (1986), provides that

> [i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

Defendant's motion for judgment on the pleadings is premised on two alternative grounds. First, defendant asserts that the Act's attorney-fee provision does not envision the award of fees to a party who prevails at the administrative level. In the alternative, defendant argues that the Commissioner was not a party against whom plaintiff prevailed at the agency level, and hence cannot be held responsible for plaintiff's attorneys' fees.

Defendant's first argument has been rejected by the overwhelming weight of authority.[2] While it is true that the literal

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[2] Of the eleven district courts that have considered this issue, ten have rejected defendant's argument. *Unified School Dist. No. 259 v. Newton*, 673 F.Supp. 418 (D.Kan. 1987); *Moore v. District of Columbia*, 666 F.Supp. 263 (D.D.C. 1987); *Kristi W. v. Graham Independent School Dist.*, 663 F.Supp. 86 (N.D.Tex. 1987); *School Board of Prince William County v. Malone*, 662 F.Supp. 999 (E.D.Va. 1987); *Burpee v. Manchester School Dist.*, 661 F.Supp. 731 (D.N.H. 1987); *Prescott v. Palos Verdes Peninsula Unified School Dist.*, 659 F.Supp.

(Footnote continued)

language of section 615(e)(4)(B) refers only to "action[s] or proceeding[s] brought under this subsection," i.e. subsection (e) of section 615, and it is arguable that section 615(e) authorizes civil actions but not administrative proceedings, *but see Michael F. v. Cambridge School Dep't*, 1986-87 E.H.L.R. Dec. 558:269, 270 (D.Mass. Mar. 5, 1987) [available on WESTLAW, 1987 WL 7752]; *Prescott v. Palos Verdes Peninsula Unified School*, 659 F.Supp. 921, 923 (C.D. Cal. 1987), the court cannot overlook the plain fact that sections 615(e)(4)(D)(i) & (E)[3] expressly envision the award of fees for administrative representation. *Michael F.*, 1986-87 E.H.L.R. at 558:271. Nor may one readily accede to an interpretation of the phrase "any action *or proceeding*" which renders the latter term mere surplusage. *New York Gaslight Club v. Carey*, 447 U.S. 54, 61, 100 S.Ct. 2024, 2029-30, 64 L.Ed.2d 723 (1980); *see United States v. Menasche*, 348 U.S. 528, 538-39, 75 S.Ct. 513, 519-20, 99 L.Ed. 615 (1955).

Any doubt to which the provision's ambiguity might give rise is dispelled by its remarkably unequivocal legislative history. *See generally* Schreck, Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act, 60 Temple L.Q.

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921 (C.D.Cal. 1987); *Holly S. v. Mars Area School Dist.*, 1987-88 E.H.L.R. Dec. 559:148 (W.D.Pa. Sept. 4, 1987) (Magistrate's Report and Recommendation, adopted by the court Sept. 24, 1987); *Dodds v. Simpson*, 676 F.Supp. 1045 (D.Or. 1987); *Keay v. Bismarck R-V School Dist.*, 1986-87 E.H.L.R. Dec. 558:317 (E.D.Mo. Apr. 14, 1987) [Available on WESTLAW, 1987 WL 16882]; *Michael F. vs. Cambridge School Dist.*, 1986-87 E.H.L.R. 558:269 (D.Mass. Mar. 5, 1987). *See also* Schreck, Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act, 60 Temple L.Q. 599 (1987). *Contra Rollison v. Biggs*, 660 F.Supp. 875 (D.Del. 1987).

[3] Section 615(e)(4)(D)(i) provides that "[n]o award of attorneys' fees . . . may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if . . . the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins."

Section 615(e)(4)(E) provides that "[n]otwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer."

599, 639-50 (1987). The Senate Report explained that Senate Bill 415 "will allow the Court, but not the hearing officer, to award fees for time spent by counsel in mandatory EHA administrative proceedings." S.Rep. No. 112, 99th Cong., 1st Sess. 14, *reprinted in* 1986 U.S.Code Cong. & Admin. News 1798, 1804. *See also* H.R. Rep. No. 296, 99th Cong., 1st Sess. 5 (1985) ("proceeding" refers to "a due process hearing or a state level review"); 131 Cong.Rec. 21392 (1985) (statement of Sen. Simon); *id.* at 31370 (remarks of Rep. Williams); *id.* at 31371 (remarks of Rep. Bartlett); *id.* at 31373 (remarks of Rep. Biaggi); *id.* at 31376 (remarks of Rep. Miller). The House Report explained that

> [t]he 'action or proceeding' language in section 2 of the bill is identical to the language in title VII of the Civil Rights Act of 1964, interpreted by the Supreme Court in [*Gaslight, supra*]. In *Gaslight*, the Court held that the use of the phrase 'action or proceeding' indicates an intent to subject the losing party to an award of attorneys' fees, expenses and costs incurred in court. The Court's decision also established a similar right under title VII to obtain an award of fees, costs, and expenses incurred in mandatory state and local administrative proceedings, even where no lawsuit is filed.

H.R.Rep. No. 296, *supra*, at 5. *See also* S.Rep. No. 112, *supra*, at 14. The Act's fee provision is essentially identical to Title VII's, 42 U.S.C. § 2000e-5(k),[4] after which it was modelled.[5]

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[4] 42 U.S.C. § 2000e-5(k) provides that "[i]n any action or proceeding brought under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

[5] To assuage the concerns of some Representatives over the provision for fee awards based solely on administrative representation, *e.g.* H.R.Rep. No. 296, *supra*, at 15 (Supplemental Views); 131 Cong.Rec. at 31371 (1985) (remarks of Rep. Bartlett) (provision "mistakenly extends the authority for the recovery of attorneys' fees into [the Act's] administrative hearing process"); *id.* at 31376 (Rep. Jeffords); *id.* at 31377 (Rep. Johnson), the House Committee included a "sunset" clause in its bill which would have replaced the words "action or proceeding"

(Footnote continued)

Defendant argues, however, that *North Carolina Dep't of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6, 107 S.Ct. 336, 93 L.Ed.2d 188 (1986), decided subsequent to the Act's amendment, requires a different result. In *Crest Street*, the Court found that both the plain language and the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, supported the conclusion that attorney's fees may not be awarded under that section "in an independent action which is not to enforce any of the civil rights listed in § 1988." 107 S.Ct. at 340. " '[T]he short answer' " to defendant's argument that the same rule should govern the fee petitions under the Education of the Handicapped Act 'is that Congress did not write the statute that way.' " 107 S.Ct. at 341 (quoting *Garcia v. United States*, 469 U.S. 70, 79, 105 S.Ct. 479, 484-85, 83 L.Ed.2d 472 (1984)). *See, e.g., Michael F.*, 1986-87 E.H.L.R. at 558:271-72. Rather, as noted above, Congress modelled the Act's fee provision on Title VII's, 42 U.S.C. § 2000e-5(k), which, unlike section 1988, authorizes a civil action seeking no relief other than attorney's fees for administrative representation. *Gaslight*, 447 U.S. at 66, 100 S.Ct. at 2032.[6]

For these reasons, plaintiff is entitled to recover a reasonable attorney's fee from the party against whom he prevailed at the administrative level on the issue of his placement at the Institute. That party, the Institute itself, is not presently before the court, and plaintiff has moved pursuant to Rule 15(a),

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with "civil action," effective four years after enactment. *Id.* at 31370. The conference committee deleted the clause. H.R.Conf.Rep. No. 687, 99th Cong., 2d Sess. 7, *reprinted in* 1986 U.S.Code Cong. & Admin.News 1807, 1809.

[6] Defendant also asserts that *Crest Street* disapproved of dicta in *Gaslight* upon which Congress relied in drafting the Act's fee provision. Even if true, "[n]othing in [*Crest Street*] does—or for that matter, could—change Congress's clear intention" to permit a parent to file a lawsuit 'for the limited purpose of receiving an award of reasonable fees, costs and expenses.' " *Moore*, 666 F.Supp. at 266 (quoting H.Rep. No. 296, *supra*, at 5); *see also Unified School District No. 259 v. Newton*, 673 F.Supp. at 423; *Burpee*, 661 F.Supp. at 733; *Michael F.*, 1986-87 E.H.L.R. at 558:272. *Contra Rollison*, 660 F.Supp. at 877.

F.R.Civ.P., to amend the Supplemental Complaint to add the Institute as a party-defendant. Leave to amend must be "freely given when justice so requires." Rule 15(a), F.R.Civ.P. Defendant's argument that leave to amend must be denied where the amended pleading is legally insufficient, while true, is irrelevant here, where the right to the relief sought is given by statute. No prejudice has been shown.[7]

The conclusion that plaintiff may seek attorneys' fees in this court for his administrative victory, however, does not settle the question of whether the Commissioner is a party liable for those fees. Plaintiff argues that, since the Commissioner is the only official with the authority to appoint state pupils to the Institute, N.Y.Educ.L. § 4201(2)(c), it is the Commissioner against whom plaintiff prevailed when he gained admission to the Institute. Plaintiff cites no authority, however, for the novel proposition that attorneys' fees may be levied against a decisionmaker.

Plaintiff might have gone on to argue that the Commissioner almost certainly violated federal law by reviewing the hearing officer's decision admitting plaintiff to the Institute. *See Burr v. Ambach, supra*, slip op. at 9, n. 4. The Act provides that the decision of a hearing officer appointed by the State educational agency – here, the State Department of Education – "shall be final" as to "complaints" within the scope of section 1415(b)(1)(E), unless challenged by civil action. 20 U.S.C. § 1415 (b)(1)(E). While, as was noted in the court's previous opinion, plaintiff is not aggrieved by the Commissioner's affirmance of the decision to place him at the Institute, *Burr v. Ambach, supra*, slip op. at 6, the unlawful act of review caused plaintiff to incur unnecessary attorneys' fees.[8]

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[7] The Institute was served with plaintiff's petition for attorneys' fees in October, 1986. Saideman Aff't, Jan. 15, 1988, ¶ 8. The Commissioner's delegate responded to that petition by stating that only the courts "are authorized to award attorneys' fees. The statute does not authorize an administrative officer such as the [Commissioner] to award attorneys' fees in such matters." Letter of Robert D. Stone to Lewis A. Golinker, Dec. 11, 1986.

[8] The Commissioner's review of the hearing officer's award of compensatory education, on the other hand, was not proscribed by the Act. *Burr v. Ambach, supra*, slip op. at 6.

Nonetheless, from such an argument it does not follow that plaintiff's remedy is an assessment against the Commissioner of the attorneys' fees he incurred by virtue of the unlawful administrative review proceeding. The general rule in the federal courts is that, in the absence of congressional authorization, the judiciary may not reward a party with his attorney's fee. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616-17, 44 L.Ed.2d 141 (1975). No statute known to the court permits it to remedy the Commissioner's violation of the Education of the Handicapped Act by requiring him to pay plaintiff's attorneys' fees. Plaintiff's only remedy is against the Institute.

CONCLUSION

Plaintiff is granted leave to file an amended complaint seeking his administrative attorneys' fees from the New York Institute for the Education of the Blind. Plaintiff shall submit full documentation in support of his claim that all of the attorney-time for which he seeks reimbursement was devoted to the issue of placement, not that of compensatory education. Plaintiff is further instructed to append to his amended complaint a typewritten transcript of the partly illegible time sheets attached to the Affidavit of Lewis A. Golinker, sworn to March 3, 1987.

The Commissioner's motion to dismiss the Supplemental Complaint is granted, and plaintiff's motion for summary judgment is denied. Because plaintiff's action has been completely terminated as to the Commissioner, the court determines that there is no just reason for delay in the entry of a final judgment. *Nat'l Metalcrafters v. McNeil*, 784 F.2d 817, 821 (7th Cir. 1986); *Backus Plywood Corp. v. Commercial Decal, Inc.*, 317 F.2d 339, 341 (2d Cir.), *cert. denied*, 375 U.S. 879, 84 S.Ct. 146, 11 L.Ed.2d 110 (1963). The clerk of the court is therefore directed, pursuant to Rule 54(b), F.R.Civ.P., to enter a final judgment dismissing all of plaintiff's claims against the Commissioner.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLIFFORD BURR, by his parents and next friends, KENNETH and BETTY BURR,

Plaintiffs,

—against—

GORDON AMBACH, as Commissioner of the New York State Education Department,

Defendant.

OPINION

86 Civ. 7164 (RLC)

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Plaintiff, a handicapped youngster, brings this action against the Commissioner of the New York State Education Department seeking declaratory and injunctive relief under the Education of the Handicapped Act ("the Handicapped Act"). 20 U.S.C. §§ 1400-1485. Plaintiff claims that the Commissioner and his designated hearing officer delayed reaching a decision to place him in an appropriate school. To remedy the deprivation of an appropriate free education which that delay occasioned him, plaintiff seeks an award of compensatory public education beyond his twenty-first birthday.[1]

Defendant moves to dismiss for failure to state a claim, under Rule 12(b)(6), F.R. Civ. P., or, in the alternative, for summary judgment. Plaintiff in turn cross-moves for summary judgment.

Background

A. Administrative Proceedings

When the private school which plaintiff Clifford Burr had attended closed it doors in June 1984, his parents applied to defendant for plaintiff's admission to a state-supported school. Defendant referred the Burrs to the New York Institute for the Education of the Blind ("the Institute"), which evaluated plaintiff and found him to be unsuitable for its program. The Burrs requested a hearing on the Institute's refusal to recommend Clifford for admission. That hearing commenced on May 2 and concluded on December 11, 1985. A decision was rendered on January 27, 1986.[2]

The decision overruled the Institute's "recommendation" that plaintiff not be admitted, and directed that plaintiff's education "continue until the end of the school year in which [he] shall attain the age of 22 years." Decision of Hearing Officer at 109. Ordinarily, a handicapped individual may expect a free public education only until he attains age twenty-one. N.Y. Educ. L. §§ 3202, 4402 (McKinney's 1981 & Supp. 1987); 20 U.S.C. § 1412(2)(B). The hearing Officer's direction that plaintiff receive additional years of free training is referred to as an award of "compensatory education."

The Institute appealed the Hearing Officer's decision to the Commissioner on February 28, 1986. The Commissioner, on May 20, issued his decision sustaining plaintiff's placement at the Institute but reversing the Hearing Officer's award of compensatory education. Plaintiff sought review in this court on September 17, 1986.

B. Statutory Framework

The Education of the Handicapped Act authorizes the provision of federal funds to participating States "to assure that all handicapped children have available to them . . . a free appropriate public education . . . ". 20 U.S.C. § 1400(c). States receiving federal monies under the Act are required, *inter alia*, to adopt extensive procedural safeguards for the protection of handicapped children and their parents. 20 U.S.C. § 1415.

This case involves the mandate of the Handicapped Act that parents be afforded "an impartial due process hearing", 20 U.S.C. § 1415(b)(2), when they are aggrieved by a "refus[al] to initiate . . . the . . . educational placement of [their] child or the provision of a free appropriate public education to [their] child." 20 U.S.C. § 1415(b)(1)(C)(ii). Where the parents' complaint concerns the refusal of a "local educational agency" (such as a local school district, *see* 5 U.S.C. § 1401(8)), the local agency is to provide an opportunity for a hearing, while that responsibility rests with the "State educational agency" (here, the New York State Department of Education, *see* 20 U.S.C. § 1401(7)) when its own action is challenged. 20 U.S.C. § 1415(b)(2). In either case, to ensure impartiality, the appropriate agency is to appoint as a hearing officer an individual whom it does not employ. *Id.*

The Handicapped Act differentiates between review of state and local agency action in one crucial respect, however. In the case of the latter, but not the former, "any party aggrieved by the . . . decision rendered in [the] hearing may appeal to the State educational agency. . . ". 20 U.S.C. § 1415(c). At this second tier of administrative review, the official charged with review "shall make an independent decision." *Id.*

The Handicapped Act provides that a second-tier decision in the case of local agency action "shall be final," 20 U.S.C. § 1415(e)(1), subject only to judicial review. 20 U.S.C. § 1415(e)(2). Where the action challenged is that of the state agency, on the other hand, the "impartial due process hearing" conducted by a hearing officer independent of the state agency pursuant to § 1415(b)(2) is reviewable only by civil action. 5 U.S.C. § 1415(e)(2). In this instance, the aggrieved party "does not have the right to an appeal" to the state agency itself. *Id.*

Defendant, as Commissioner of the New York State Department of Education ("the Department"), is vested under state law with the duty to "make appointments of pupils" to state-supported schools for the deaf and blind, among them the Institute. N.Y. Educ. L. § 4201(1)(h) & (2)(c) (McKinney's 1981). By regulation, a state-supported school such as the Institute makes a recommendation to the Commissioner as to the appointment of an applicant-child to its program. 8 N.Y.C.R.R. § 200.7(d). The regulation provides for a single tier of administrative review where the Commissioner declines to appoint a child whom the school has recommended for appointment. 8 N.Y.C.R.R. § 200.7(d)(2). But where, as in plaintiff's case, the school does not recommend a child for appointment, the child's parents may request a hearing before "an impartial hearing officer. . .designated by the department." 8 N.Y.C.R.R. § 200.7(d)(1). The hearing officer's decision is in this situation subject to review by appeal to the Commissioner. 8 N.Y.C.R.R. §§ 200.7(d)(1) & 200.5(d).

Discussion

Plaintiff's amended complaint is premised upon the theory that the operation of 8 N.Y.C.R.R. § 200.7(d)(1) deprived him of the "impartial due process hearing" that the Handicapped Act promises. Plaintiff points to the Handicapped Act's insistence that an independent hearing officer's decision be final when the action complained of is that of the state agency, 20 U.S.C. § 1415(e)(1), and contends that defendant, by reviewing that independent decision, rendered it a nullity in effect. Defendant argues, to the contrary, that his regulation is fully consistent with the commands of federal law.

The details of the Handicapped Act's procedural safeguards are not mere technicalities, *see Board of Education v. Rowley*, 458 U.S. 176, 205-6 (1982), but rather embody the emphasis Congress placed upon "the participation of the parents in developing the child's educational program and assessing its effectiveness." *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359, 368 (1985). To assure that parents in dispute with school officials not be placed at a competitive disadvantage, *id.*, Congress adopted a "minimum standard of impartiality" to govern the hearing and review of parental complaints. Sen. Conf. Rep. No. 455, 94th Cong., 1st Sess. 48-49 (1975), *reprinted in* [1975] U.S. Code Cong. & Admin. News 1480, 1502. Because the impartiality and finality requirements are so central to the Handicapped Act's substantive purposes, departures from their strict terms are not tolerated. *See, e.g., Helms v. McDaniel*, 657 F.2d 800 (5th Cir. 1981), *cert. denied*, 455 U.S. 946 (1982); *Monahan v. State of Nebraska*, 645 F.2d 592 (8th Cir. 1981), *cert. denied*, 460 U.S. 1012 (1983); *Sherry v. New York State Education Dept.*, 479 F. Supp. 1328, 1337-38 (W.D.N.Y. 1979).

The right to an "impartial due process hearing" under the Handicapped Act extends to parental

> complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

20 U.S.C. § 1415(b)(1)(E) & (2). Only insofar as plaintiff's "complaint" concerned one of the matters just stated do the strict procedural and finality requirements of § 1415 come into play. Of the two issues that defendant decided in his challenged review, one concerned the "educational placement of the child" at the Institute. Plaintiff, however, is not aggrieved by defendant's decision on that score; rather, plaintiff complains of defendant's reversal of the Hearing Officer's award of compensatory education through age twenty-two. If indeed this is a complaint within the scope of section 1415(b)(1)(E), it could only be one that concerns "the provision of a free appropriate public education" to plaintiff.

The Handicapped Act guarantees that states receiving federal funds will provide a "free appropriate public education," but only through age twenty-one. 20 U.S.C. § 1412(2)(B). As the provision of free education past age twenty-one is not a substantive right secured by the Handicapped Act, it is inconceivable that Congress contemplated extending procedural protections to parties claiming that right. *See Stemple v. Board of Education of Prince George's County*, 464 F. Supp. 258, 260 (D.Md. 1979), *aff'd on other grounds*, 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981). Thus, plaintiff's claim that defendant's decision must be nullified as in conflict with the procedural requirements of the Handicapped Act is without merit in this instance.[2]

Plaintiff argues, however, not only for the reinstatement of the Hearing Officer's award of compensatory education but, in the alternative, that the court itself should compensate him for lost educational opportunities, including the added delay that defendant's review caused him. As such relief is barred by the eleventh amendment, the court need not address any of defendant's other arguments in opposition to it.

The eleventh amendment limits the power of the federal courts to award relief against state officials when that relief amounts to a "money judgment payable out of the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 666 (1974). In *Edelman*, a class of plaintiffs sued the Illinois official charged with administering federal and state payments in aid of the aged, blind and disabled under the Social Security Act. The state agency implemented policies which had the result of wrongfully delaying and withholding benefits from eligible recipients. The Court of Appeals affirmed a District Court order which directed the state agency to pay the benefits so withheld. The Supreme Court reversed, holding that retroactive monetary relief, even if characterized as "equitable restitution," infringed the state's sovereign immunity in violation of the eleventh amendment.

Plaintiff does not distinguish *Edelman*, but argues instead that the subsequent decision in *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985), permits the relief he seeks notwithstanding the eleventh amendment's prohibition.

Neither *Burlington* nor *Miener v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986), however, supports the proposition that a federal court may award compensation against a *state* official for education wrongfully withheld under the Handicapped Act. The defendant in *Burlington* was not a state but a locality; since "a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment," *Edelman*, *supra*, 415 U.S. at 667 n. 12, the issue at bar did not arise in that case. In *Miener*, the Eighth Circuit simply reversed its earlier holding that the Handicapped Act, as a matter of congressional intent, did not authorize relief in the form of compensatory education. *See Miener v. State of Missouri*, 673 F.2d 969, 979-80 (8th Cir.), *cert. denied*, 459 U.S. 909; *id.* at 916 (1982). The court did not, however, reconsider its original view that the eleventh amendment barred an award of such retroactive relief against the state defendants. 673 F.2d at 980-81.

For the reasons just given, defendant's motion to dismiss the amended complaint is granted.* Plaintiff's motion for summary judgment is denied.

IT IS SO ORDERED.

Dated: New York, New York
November 9, 1987

/s/ Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

FOOTNOTES

1. Plaintiff's supplemental complaint also seeks costs and attorney's fees, pursuant to 20 U.S.C. § 1415(e)(4)(B), for representation in connection with the administrative proceedings herein.

2. 8 N.Y.C.R.R. §200.5(c)(10), which governs such hearings, requires that a decision be rendered within 45 days after the hearing commences.

3. The potential for abuse under defendant's regulations is, however, apparent. Had defendant reversed the Hearing Officer's decision placing plaintiff at the Institute, plaintiff's federal procedural rights might well have been infringed.

4. Plaintiff's claim for attorney's fees, brought by way of a supplemental complaint, remains to be resolved.

No. 11639

The University of the State of New York

The State Education Department

Before the Commissioner

Application of the NEW YORK INSTITUTE FOR THE EDUCATION OF THE BLIND for a review of a determination of an impartial hearing officer relating to appointment to a school for the handicapped pursuant to the provisions of Education Law Article 85.

Brown & Wood/Tufo & Zuccotti, Esqs., Anita F. Barrett, Esq., of counsel, and Neil Howard Rosenberg, Esq., attorneys for petitioner

New York Lawyers for the Public Interest, Inc., Lewis A. Golinker, Esq., of counsel, and New York Law School Federal Litigation Clinic, Peter Margulies, Esq., of counsel, attorneys for respondent

Petitioner appeals from the determination of an impartial hearing officer which reviewed petitioner's refusal to recommend respondents' son for a State appointment to the New York Institute for the Education of the Blind (NYIEB) pursuant to Article 85 of the Education Law, and which found that the student should be recommended by the NYIEB for such appointment and recommended that such appointment continue an additional one and one-half years after the student attains 21 years of age. The appeal must be sustained in part.

Respondents' son is currently eighteen years of age and was identified as a multiply handicapped child at a very early age. There is no dispute between the parties regarding the boy's classification as multiply handicapped with profound mental retardation, blindness and an orthopedic handicap due to cerebral palsy.

The most recent psycho-educational evaluation of the student was completed by the NYIEB on November 26, 1984, when the boy was age sixteen years eleven months. A developmental profile indicates that his motor skills were at the level of the average child at age one year eight months. Self-help skills and social development were at the level of a two year two month old child. His academic skills were at the level of one year six months, and communication skills were at the level of an average three year old.

The determination that the student's academic skills were at the one year six month level was based on his ability to provide his own address and telephone number. He appears to be aware that different activities occur at different times each day. Most of his expressive language appears to be memorized, and he is able to repeat rhymes, count to six, sing several songs and use basic sentences to express his needs for toileting or feeding. A speech/language evaluation completed in April, 1984 indicates that he is able to produce four to five word expressions. He is able to respond to questions after extended delay.

The student is described as uncoordinated and unsteady on his feet, requiring minor assistance on stairs, particularly in descending. He also requires assistance exiting from a school bus, but only minimal assistance in most areas of self-help, and he can independently eat with a spoon and drink from a cup. He needs assistance in toileting and dressing, but can undress independently.

The evaluations indicate that the student generally does not initiate interaction with others. A variety of stereotypical behaviors is reported, most notably rocking and flicking behaviors. He occasionally has been observed to scratch adults or pull their hair.

Respondents' son attended the Jewish Guild for the Blind for several years and subsequently moved to a program at the Association for the Advancement of Blind and Retarded (AABR) in September, 1981. After the AABR advised the New York City Committee on the Handicapped (COH) in the spring of 1984 that its program would close at the end of the school year, the

COH developed a Phase I individualized educational program (IEP) which recommended placement in a Specialized Instructional Environment II class at P.S. 396 with a student-to-staff ratio of 9 to 1 plus 3 teacher assistants, speech/language therapy twice a week, and educational vision services twice a week. Although the parents agreed that the goals and related services provided in the IEP were appropriate to meet their son's educational needs, they objected to the COH placement recommendation.

The assistant superintendent of citywide programs also questioned the recommended placement at P.S. 396 and upon reconsideration the COH determined that no appropriate placement was available in the public schools.

The COH then tried to locate a private school placement, but the student was rejected by each school to which an application was made. The student was provided with home instruction while an alternative placement was sought. The COH again recommended placement at P.S. 396, since that school had altered the program it had previously offered. The parents objected and requested an impartial hearing. In a decision dated December 6, 1985, the hearing officer in that proceeding held that the placement at P.S. 396 was not appropriate to meet respondent's needs. The school district did not seek review of that decision.

While the placement recommended by the COH was under review, the student's parents applied to the State Education Department for an appointment to one of the State-supported schools specified in Education Law section 4201. In accordance with 8 NYCRR 200.7(d), the application was referred to petitioner to conduct an evaluation of respondent. Petitioner completed the evaluation on November 26, 1984, and on January 2, 1985 petitioner advised respondents that it would not recommend their son for appointment to petitioner's school. The parents requested an impartial hearing, and a hearing was held on sixteen different days between May 2 and December 11, 1985. On January 27, 1986, the impartial hearing officer issued a decision finding that the NYIEB could provide an appropriate education for the student, and recommending that I appoint him to

attend New York Institute for the Education of the Blind. The hearing officer also recommended that the student receive an additional one and one-half years of education after he reaches the age of 21, in view of the extensive delay in reaching a determination in this matter.

Petitioner advances several arguments, both procedural and substantive, in seeking review of the hearing officer's decision.

Initially, petitioner contends that the hearing officer should have disqualified himself because the hearing officer had previously contacted the attorneys representing respondents with regard to a matter concerning his own child. Although petitioner promptly noted its objection concerning the possibility of partiality by the hearing officer on the record at the outset of the hearing, I must note that petitioner makes no specific allegation of partiality on the part of the hearing officer with respect to any action taken by the hearing officer throughout the very lengthy hearing. In material part, 8 NYCRR 200.1(o) provides that a hearing officer shall be:

> "... independent, shall not be an officer, employee or agent of the school ... shall not have a personal or professional interest which would conflict with his or her objectivity in the hearing, and shall not have participated in any manner in the formulation of the recommendation sought to be reviewed ...".

Petitioner has failed to establish that the hearing officer does not meet that standard. Absent any specific allegation of partiality and finding no such instance in the record before me, I find that petitioner's argument concerning the impartiality of the hearing officer is without merit.

With respect to the hearing officer's recommendation that the student receive an appointment to its program, petitioner contends that is unable to provide him with an appropriate education. However, upon review of the extensive record before me, including numerous exhibits documenting the student's educational needs as well as the program offered at New York Institute for the Education of the Blind, I must conclude that

New York Institute for the Education of the Blind is an appropriate placement for respondents' son.

The program in which the student would be placed at NYIEB is designated as "Frampton Hall". Most of the students in the program have vision and hearing losses resulting from maternal rubella. The student/staff ration is 6 pupils to 1 teacher with two teacher assistants, which will provide the student with the individual attention he needs.

There are four verbal students in the program population who are grouped together with one nonverbal student in a class. Although respondents' son has no background in the total communication skills which are used in the program, the level of language development among children in the group, as well as verbal development activities provided in the program, indicate that this student's language skills would be appropriately addressed and developed.

The program is also able to provide activities in independent living skills which the student needs to develop, including self-help skills, exploratory activities, orientation and mobility skills. Although petitioner argues that no individual in the program exhibits the same combination of disabilities as does this student, it is clear that each student in the program exhibits some educational deficits which are similar to those of respondent's son. The goals included in some of the other students' Phase I IEPs include exploratory activities, motor skills, self-help skills, following directions and decreasing stereotypical behavior, and those are similar to the goals outlined on the Phase I IEP prepared for respondents' son by the COH of the school district.

In addition, testimony presented at the hearing, as well as a State Education Department program evaluation, indicate that petitioner's staff is qualified to address all of the student's educational needs, currently serves those needs in its present population, and that all of the special services required by petitioner can be provided.

Petitioner alleges that respondents' son exhibits a higher level of aggressive behavior than that of the students in the Frampton

Hall program, and that the placement is therefore inappropriate. Although it is evident that respondent's son occasionally acts out in response to frustration, such behavior is not unexpected in an individual with underdeveloped communication skills, and is apparent in some of the other students in the Frampton Hall program. The boy's reaction to frustration can be controlled by adult intervention with verbal directives. The student to staff ratio provided in the Frampton Hall program is thus more than adequate to address that area of behavior, and I must conclude, as did the hearing officer, that petitioner can provide respondents' son with an appropriate education.

Petitioner argues that it is phasing out the non-academic program in which respondents' son would be placed, and that it has not accepted a new student in the program in three years. Petitioner further argues that the student does not meet the admissions criteria for the academically oriented program it will continue to provide.

However, petitioner indicates that it will continue to offer the Frampton Hall program until the currently enrolled pupils reach twenty-one years of age. Because some of the individuals in the program now are younger that respondents' son, this program and its attendant services will be available as long as he is of school age and his admission to petitioner's non-academic program will not interfere with petitioner's plan to phase-out the program. The fact that respondents' son cannot meet the admissions criteria for petitioner's continuing academic program for the less severely handicapped is irrelevant to entry into the Frampton Hall program.

Although I have indicated that petitioner's future program plans will not be affected by the student's appointment to its non-academic program, I must note that petitioner appears to be under the erroneous impression that its curricula and programs may not be affected by State action. Section 4201 of the Education Law clearly subjects petitioner and the other State-supported schools to the authority of the Commissioner of Education. Indeed, paragraph (c) of subdivision 2 of that section specifically authorizes the Commissioner to "prescribe courses

of study" offered by the State-supported schools to "meet the requirements of the State for the education of State pupils." Petitioner's reliance upon two of my decisions in which I sustained the conclusions of hearing officers upholding the recommendation of two schools that State appointments not be made (*Matter of Handicapped Child*, 23 Ed. Dept. Rep. 273, and *Matter of Handicapped Child*, 23 id. 276) is misplaced because in neither instance did the Article 85 school have an appropriate placement for the students in question.

Petitioner's other arguments in support of its contention that the student should not be recommended for appointment to its school include budgetary considerations as well as what it alleges is NYIEB's historical mission. Those reasons are not relevant to the determination whether petitioner can provide the student with an appropriate education, and I need not address them further.

Petitioner also contends that the hearing officer's decision must be annulled because the NYIEB is not the least restrictive placement for respondents' son. Although petitioner attempts to compare its program with the placement at P.S. 396 recommended by the COH, it must be noted that the latter placement was determined by another hearing officer to be inappropriate. Petitioner's assertion that respondents' son should be in a public school program in order to afford him the opportunity for interaction with nonhandicapped peers ignores the extent and nature of his handicapping conditions. The placement of a handicapped student in a building serving handicapped children exclusively is not inconsistent with the requirement that handicapped students be educated with nonhandicapped peers to the maximum extent appropriate where the needs and abilities of such student preclude the student from taking part in activities with nonhandicapped students (*Matter of a Handicapped Child*, 19 Ed. Dept. Rep. 455; *Matter of a Handicapped Child*, 19 id. 485).

Petitioner also argues that its program would not be the least restrictive environment because of the distance and travel time for daily trips between the student's home and NYIEB, and expresses concern about the student's need for assistance exiting

from a bus. Proximity of a student's residence to a particular program is to be considered, but is not the sole factor in detrmining the least restrictive environment (*Matter of a Handicapped Child*, 22 Ed. Dept. Rep. 571; *Matter of a Handicapped Child*, 24 id. __, Decision No. 11426, dated March 12, 1985). In this instance, the student would be required to ride the bus one and one-half hours each way to attend petitioner's program and would require assistance exiting the bus. Neither the Education Law nor the regulations established thereunder provide any maximum time limit for the transportation of handicapped children (*Matter of a Handicapped Child*, 19 Ed. Dept. Rep. 494). The record indicates that the student's most recent experience with transportation - a one-hour bus ride to AABR - was successful. There is no reason to conclude that the one and one-half hour bus ride to New York Institute for the Education of the Blind renders placement there inappropriate. In addition, although petitioner has indicated has indicated that it does not regularly provide assistance to its students in entering or exiting the bus, there is nothing in the record which indicates that petitioner could not provide such assistance.

Petitioner also argues that the hearing officer erred in recommending that respondents' son continue in attendance at the NYIEB beyond his twenty-first birthday because of the delay which occurred in petitioner's processing of respondents' application and in the conduct of the hearing. The hearing officer concluded that the student was entitled to compensatory education, "without attributing all of the unnecessary delay in resolving the controversy about placement to IEB. Petitioner (the boy's parent), also is not without fault, and neither am I".

Although I have previously indicated that there is no statutory or regulatory provision entitling a student to continue to receive educational services after attaining 21 years of age (*Matter of a Handicapped Child*, 19 Ed. Dept. Rep. 148) and there is an as yet unresolved difference of opinion among the courts on this issue (*Timms v. Metropolitan Sch. Dist.*, 722 F 2d 1310; *Miener v. State of Missouri*, 673 F 2d 969, cert. den. 103 S. Ct. 215; *Anderson v. Thompson*, 658 F 2d 1202; *Max M. v. Thompson*,

592, F. Supp. 1450), an order directing the provision of compensatory education would clearly be unwarranted in any event, given the hearing officer's own assessment of fault. While I do not condone the excessive delay, as I will discuss below, I cannot sanction an order requiring the provision of an additional year and one-half of instruction by petitioner.

After reviewing the record in this matter, I am compelled to comment on the length of time over which the hearing was conducted. Although the student's parents requested a hearing in January, 1985, the hearing did not commence until May, 1985. Sixteen hearing days were consumed before the hearing was completed, and because of adjournments, the hearing was not finally declared closed until December 11, 1985, and the decision was issued on January 27, 1986.

Section 200.5(c)(10) of the Regulations of the Commissioner of Education requires that an impartial hearing officer render a decision no later than 45 calendar days after the initiation of such hearing. In this instance, the hearing officer's decision was issued 260 days after initiation of the hearing. I find it completely unacceptable that an impartial hearing convened for the purpose of providing educational services to a handicapped child required nearly a year to complete. The delay in this instance appears to be attributable solely to the management of the hearing by the hearing officer, and is unconscionable.

THE APPEAL IS SUSTAINED IN PART, and

IT IS ORDERED that the decision of the hearing officer is annulled to the extent that it ordered that compensatory education be provided to respondent.

Seal

IN WITNESS WHEREOF, I, Gordon M. Ambach, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 20th day of May, 1986.

/s/ Gordon M. Ambach
Commissioner of Education

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In the Matter

of the

Appeal of

KENNETH and BETTY BURR from the recommendation of the New York Institute for the Education of the Blind regarding the further education of their son, CLIFFORD.

DECISION

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Hearings: 2 and 14 May 1985
8 June 1985
1 and 11 July 1985
23 and 30 September 1985
1, 4 and 15 October 1985
6, 8 and 12 November 1985
4, 5 and 11 December 1985

2 World Trade Center
New York, New York

270 Broadway
New York, New York

New York Institute for the Education of the Blind
Bronx, New York

Before: A. William Larson
Hearing Officer
464 Main Street #106
Port Washington, NY 11050

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OVERVIEW

This appeal concerns the education of a multiply handicapped boy, Clifford Burr, who attained the chronological age of 18 years on 30 December 1985. Handicapped by reason of profound mental retardation, blindness and cerebral palsy, Clifford has been in need of special education since birth. "We didn't know how to handle it, and we needed all the help we could get, from the moment he was born, even before he left the hospital." So said the father, Kenneth Burr, in his testimony at the hearing in the session held 11 December 1985. (Tr 1731/21-23)[1] In light of the father's testimony among other evidence, Clifford's educational requirements were not easily to be fulfilled. Early "patterning" was followed by a pre-school program in Brooklyn, where the Burrs resided, and thereafter Clifford attended, first, the Jewish Guild for the Blind (JGB), followed by the Association for the Advancement of the Blind and Retarded (AABR).

The Committee on the Handicapped (COH) had identified AABR as an appropriate placement for Clifford in 1981, lacking one in the public schools of New York City. In anticipation of the closing of Clifford's AABR program in June 1984, the COH recommended that he continue his education for the 1984-85 school year in the then-Track IV program at Public School 396 (PS 396) in Brooklyn. This program was only in formation at the time of the recommendation, and after a site visit the Burrs registered their objection to such placement with the COH. Reconsideration by concerned school district officials thereafter resulted in a determination that Track IV in PS 396 would not meet Clifford's needs. This appears to have precluded appropriate public school placement, and referral to

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[1] The reference is to page 1731, lines 21-23, of the transcript of proceedings. Other citations of the transcript will be similar except in regard to the first session of the hearing, 2 May 1985, for which the designation will be "TrS," a feature occasioned by the renumbering of pages in the following session's transcript before consecutive numbering was continued. Respondent's exhibits are to be designated "REx #" and Petitioner's "PEx #."

the Central Based Support Team (CBST) followed for the purpose of seeking placement in the private sector. This led to inquiries, one of which resulted in an indication, by letter of 2 November 1984, that United Cerebral Palsy of New York City, Inc. found Clifford to be an appropriate candidate for their Manhattan Severely Handicapped Program. Prior to that occurrence, however, the Burrs had received notification from the New York State Education Department (SED), in a letter dated September 27, that the application of the parents for placement in a state-supported or state-operated school was being referred to the New York Institute for the Education of the Blind (IEB).

IEB responded to the referral by writing to Mr. and Mrs. Burr on November 6 about the scheduling of an evaluation of Clifford for November 28. The latter date was advanced to November 26, and the evaluation resulted in a recommendation by IEB's Multidisciplinary Team (MDT) that Clifford "not be appointed to our program." (PEx 5) The Burrs were so informed by letter of 2 January 1985 from Leslie Trott, MDT Chairperson, which enclosed copy of Trott's letter of same date to Dr. Rebecca Cort, Acting Supervisor, SED, (PEx 5 and REx 3) and copies of attachments that set forth "evaluation findings and instructional objectives." Completing a summary overview, attention is directed to the opening and closing of the communication of Trott to Cort:

> At a recent meeting, the Multidisciplinary Team of the New York Institute reviewed evaluations concerning Clifford Burr, 17-years of age. Evaluation findings enabled the Team to agree that Clifford, as a multiply handicapped student, functions with a primary handicap of mental retardation. As a result of this finding, it is recommended he participate in a program of habilitation for the mentally retarded. Clifford would not benefit from an educational program for the blind, and, therefore, educational placement at the New York Institute for the Education of the Blind is not recommended ...

> In summary, Clifford Burr is a seventeen-year old youngster whose primary handicap is mental retardation. He would benefit most from placement in a program for the mentally retarded. His instruction should be of a habilitational nature and focus on his learning appropriate behavior and to take care of his own needs. He does not have academic potential and would not benefit from enrollment in an educational program for the blind. He is not recommended for enrollment at the New York Institute for the Education of the Blind.

This forms the basis of the appeal of Burr v. Institute, but Clifford's parents in effect had previously filed a notice of appeal, requesting "an Impartial Hearing," by their letter of 21 December 1984 to SED's Assistant Commissioner Lawrence C. Gloeckler. (REx 8) In this letter Mr. and Mrs. Burr write of their having learned at a conference at IEB on 11/28/84 that "all voted no" regarding Clifford's admission, that "nothing (in writing) had been received to date," and that they were requesting, in addition to the hearing, interim placement of their son at IEB and "the Commissioner's review of any possible time violations in this case."

RELEVANT STATUTORY PROVISIONS

IEB is a so-called "4201 school," one of several identified by name in Article 85, Section 4201, Education Law of the State of New York. These are State-supported institutions, as explained in the Article, and with respect to them the duties of the Commissioner of Education, specified in #4201, include: "To make appointments of pupils to the several schools, to transfer such pupils from one school to another as circumstances may require; to cancel appointments for sufficient reason." In #4206 it is provided in part as follows:

> 1. All blind persons of suitable age and capacity and who shall have been residents in this state for one year immediately preceding the application or, if a minor, whose parent or

> parents, or, if an orphan, whose nearest friend, shall have been a resident in this state for one year immediately preceding the application, shall be eligible for appointment as state pupils to the Institute for the Education of the Blind in the city of New York...

Reference to multiple handicaps appears in #4209 which provides in part that:

> 1. All children who are both blind and deaf or both blind and cerebral palsied shall be admitted as state pupils into one of the institutions described in this article for the instruction of the deaf or blind and under the same conditions of eligibility as are provided for the admission of deaf or blind state pupils.

The application of the foregoing statutory provisions is amplified by Regulations of the Commissioner of Education. Part 200, effective 1 July 1984, includes governing specifications in #200.7(d):

> (l) Application for State appointment of deaf, blind or severely physically handicapped pupils to ... State-aided schools ... shall be initiated by parents through application to the commissioner, supported by adequate written evidence of the blind, deaf or severely handicapping condition. The commissioner will direct the parents to make arrangements at a designated ... State-supported school for an evaluation. Such school will evaluate the child's eligibility for its program and notify the parents and commissioner of the results of such evaluation and recommend appointment if appropriate. In the case of a child not recommended for appointment to a particular ... State-supported school ... the school shall notify the parent. Such notification shall be comparable to that required by section 200.5(a) of this Part, shall include all reasons for lack of

> acceptance of the child into the program ... and shall include suggestions for more appropriate placement or program.

This section then makes provision for appeal procedure, including hearing and review, and subsection (ii) provides further that "Deaf or blind children will be appointed to the school for the deaf or blind nearest their place of residence on a day basis." In section 200.5(a), referred to in #200.7(d), the required notification to the parent includes the following in subsection (5): "The board of education shall notify the parents of its decision and arrange for placement of the pupil within 30 days of the committee's recommendation."

Both underpinning and overarching State statutory provisions, legislative enactments and related regulations alike, is P.L. 94-142, the Education for All Handicapped Children Act of 1975, providing that "It is the purpose of this Act to assure that all handicapped children have available to them ... a free appropriate public education ... designed to meet their unique needs ..." (Section 601(3)(c)) It is further provided that "The State (shall have) established ... procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped ..." (Section 612(5)) This concept is again set forth in implementing Federal regulations (34 CFR Part 300) under the heading of "Least Restrictive Environment." (Reg. 300.550(b)(l))

ISSUES

In my opening statement 2 May 1985, the first session of the hearing,[2] I said: "The Institute's case is the first to be presented, as it has the burden of proving the reasonableness of the recommendation against placement, as well as the timeliness of its actions." (TrS 6/24-25; 7/2-4) Further on in my statement, after reviewing reasons for the delay in getting

[2] The hearing required 16 sessions -- May 2 - December 11.

started, I referred to "... the question to be resolved here, namely, whether the Institute reasonably determined that Clifford's placement, presumably in the Frampton Hall program, would not be the appropriate education in the least restrictive environment contemplated by applicable statutes." (TrS 15/7-14; the comma after "program" has been added here.)

Representing Respondent IEB throughout the hearing has been the firm of Tufo & Zuccotti, Anita F. Barrett, of Counsel.[3] In her opening, Barrett said: "... the issue to be determined by the Hearing Officer in this case is whether the Institute would be the appropriate placement for Clifford in the least restrictive environment." (TrS 19/22-25; 20/2)

Serving as advocate for Petitioner is Ms. Victoria Ruocco, Protection and Advocacy Specialist, State of New York Commission on Quality of Care for the Mentally Disabled.[4] Her opening included this statement: "The only question there seems to be before us today is whether or not the Frampton Hall program is an appropriate program and whether the Institute is appropriate for Clifford Burr." (TrS 28/22-25; 29/2)

In the closing session, December 11, summations were made by Lewis A. Golinker for Petitioner and, for Respondent, by Barrett and co-counsel Neal H. Rosenberg. Regarding issues, Golinker said: "The expressed purpose of this hearing was to determine whether Frampton can appropriately educate Clifford. And then the second question is whether Clifford can or may receive a period of compensatory ed." (Tr 1861/15-19)

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[3] Neal Howard Rosenberg, Esq., made an appearance as co-counsel for Respondent on 28 June 1985.

[4] Lewis A. Golinker, Esq., New York Lawyers for the Public Interest, Inc., appeared on May 2 as counsel for Petitioner, and there were further appearances September 18 by Michael L. Perlin and Peter Margulies of the Federal Litigation Clinic, as well as Clinic student interns Mark Colligan, Noreen Cooney, Maureen Mahoney, Heidi Minuskin, Agnes Reiss, and Steve Foreht.

Barrett's closing included another reference to issues, comparable to but not identical with her opening: "We would restate the issue to be determined by you as whether the institute was reasonable in its decision to reject Clifford, or rather to recommend that the State Education Department concur in the decision not to accept him at this time." (Tr 1879/4-9) Rosenberg essentially concurred in completing the summation for Respondent: "And I think the issue is, was my client reasonable when they rejected Clifford." (Tr 1887/18-20) He also acknowledged the issue of compensatory education, stating that "I disagree with Mr. Golinker," (Tr 1888/8-9) and "... it is my position they are not entitled to any compensatory education." (Tr 1889/22-23)

The Burrs, as previously indicated, raised three issues in their letter to SED of 12/21/84: IEB's rejection of the application for Clifford's admission, "interim placement" at IEB, and "possible time violations" by IEB. (REx 8) The Commissioner did not provide for interim placement, and this request of the Burrs was not mentioned in the letter of 9 January 1985 that I received from SED confirming my appointment as impartial hearing officer for this appeal. This letter, sent to me by Lawrence C. Gloeckler, Assistant Commissioner for Education of Children with Handicapping Conditions, includes the following:

> Mr. and Mrs. Burr are appealing the recommendation of the New York Institute for Education of the Blind which rejects Clifford's placement at the Institute. There is also a secondary issue involving the timelines [sic] of notice in this matter from NYIEB to the parents.

It is clear that Gloeckler's reference was intended to be to the question of "timeliness" on the part of IEB in its contact with the Burrs. This concern about timeliness was soon overtaken by greater concern about time: the time required, in the first instance, to get the hearing started on 2 May 1985, and then the time that passed before it came to a close on December 11. This was understandable to say the least, and expressions

of concern emanated periodically not only from Petitioner, but from all parties involved in this proceeding. In my opening statement at the opening of the hearing, I said: "We are meeting to commence this hearing in the morning of 2 May 1985, no fewer than 80 days after the normal deadline for decision, 125 days following receipt of notice of appeal, and but ... several weeks before the end of the 1984/85 school year. These numbers reflect very considerable delay, and I believe that comment is called for in this opening statement of mine." (TrS 4/24-25; 5/2-8) I thereafter recounted developments from January-May, including procedural issues that had arisen and my action with respect to them. (TrS 8-14) At the final session my comments included the following:

> This is a hearing which some, if not all, may feel has gone on far too long. Inasmuch as a decision ... should have been forthcoming in ... February of this year, perhaps by any standard of measurement one would say that the duration of this hearing has been excessive. And if that is true, I would accept the responsibility ... At least I believe that the hearing has certainly afforded an opportunity for each side to make a presentation of its case fully and fairly, and that is not unimportant. (Tr 1724/15-25; 1725/2-6)

The record of this proceeding, running through 16 sessions of hearing testimony and receiving documentary evidence, produced transcripts with a total of almost 2,000 pages, and the exhibits add up comparably all told. In addition, there have been numerous letters and memoranda from counsel, including one from each side post-hearing, as well as many decisions of the Commissioner and the courts. This must surely give pause, to reviewing authority or to any other reader of this decision, to wonder about the zeal with which the representatives of the parties must have pursued their respective interests, and the manner in which the hearing was conducted so as to have allowed it to continue for many months and the record to have become so voluminous. Apart from the soundness of the decision herein set forth, some judgment about the propriety of

the procedure leading up to it is not unlikely on the part of a reviewer.[5]

The main issues presented for consideration are: (1) Was IEB reasonable in recommending that Clifford Burr not be accepted for placement in one of its programs? (2) Did IEB fail to observe prescribed time limits in acting on the Burr referral

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[5] One may also be inclined to speculate on the occasion for the SED referral giving rise to this appeal. In her opening, Barrett said "... there is no one at Clifford's functioning level that has been accepted at the New York Institute for some time. This is a policy of the school which is within its rights. It is its right to determine its own admissions policy. Much has been said in the preliminary proceeding as to the Frampton Hall program. We will offer evidence as to the history of that program and the current Frampton Hall program, as in fact, our expert believes it is inappropriate for Clifford to be placed there, for there is no suitable group or class for him at Frampton Hall now. It is not the duty of the Institute to create a program for him, merely because it has other students who are multi-handicapped. We believe that the history and current program for Frampton Hall is relevant as to the overall correctness and reasonableness of its determination ... The Institute is engaged presently in reviewing the direction for its future. We believe this is within its rights as a private institution." (TrS 25/3-22; 26/2-5) Dr. Robert Guarino, IEB Director, described "Admissions Criteria" adopted by IEB in May 1983 (REx 20) to "reaffirm its course of education for visually impaired children that had academic potential," part of "a new five year plan, which was formally adopted in February of 1985." He said that "Clifford would not meet the educational criteria," that he "was with the State Education Department" in 1983, but "did not see" the new IEB Criteria at that time. SED was notified, however, according to Guarino, who acknowledged that he had been "surprised to have (the Burr) referral made in view of the fact that the State Education Department had been notified of the change..." His explanation for SED's referral under the circumstances? "My understanding," he said, "is that the State Education Department refers — at its pleasure can refer to any school at any time for any reason without regard to criteria of schools." (Tr 391/16-19; 392/6-8; 394/7-8; 399/8-9; 401/7-8; 476/3-5, 11-16; 532/7-13) One might reasonably question the efficiency of operations in an educational bureaucracy if the left hand does not appear to know what the right hand is doing or, alternatively, a State agency routinely makes referrals without regard for the changing policy of a State-supported school.

from SED? And, contingently, (3) Is Clifford entitled to a period of compensatory education at IEB? Subsidiary issues related to those enumerated, which emerged before and during the hearing, will be covered in consideration of the presentations of the parties.

RESPONDENT'S CASE

The case of Respondent IEB, presented by co-counsel Barrett and Rosenberg, consisted of 25 exhibits and the testimony of eight witnesses. All of the evidence related, at least ostensibly, to the determination of IEB, following evaluation of Clifford Burr, that he "not be appointed to our program." (REx 3) So stated the "Referral Status Notification" in the form of the letter of 2 January 1985 to Mr. and Mrs. Kenneth Burr from the Chairperson of IEB's Multidisciplinary Team. A copy of this letter appears in the indicated exhibit as an attachment to letter of the same date from the same source, namely, Dr. Leslie A. Trott, to Dr. Rebecca Cort of SED. Other attachments to the Trott letter to Cort consisted of the MDT's "Summary Sheet," report of "Psychoeducational Evaluation," and report of "Educational Evaluation." The letter itself included in part the following:

> In summary, Clifford Burr is a seventeen-year old youngster whose primary handicap is mental retardation. He would benefit most from placement in a program for the mentally retarded. His instruction should be of a habilitational nature and focus on his learning appropriate behavior and to take care of his own needs. He does not have the academic potential and would not benefit from enrollment in an educational program for the blind. He is not recommended for enrollment at the New York Institute for the Education of the Blind.

Clifford Burr, as described by Trott in the letter to Cort, is "a multiply handicapped student" whose "mannerisms and inappropriate behaviors severely interfere with his learning." These mannerisms were said to include "head rocking, body

rocking, hand waving, and flicking articles," and, in addition, "Clifford was observed to pull his mother's hair and scratch an examiner." He "requires physical prompting for most tasks... is dependent in all forms of travel due to lack of skill and balance ... is dependent in activities of daily living. . . (and) in all areas of development, Clifford functions as a profoundly retarded youngster."

Trott wrote about the development age levels indicated on the basis of IEB's evaluation: performance of skills assigned -- 18-24 months; gross motor skills - 24 months; communication skills - 32-36 months; and self-help skills - 26 months. The Summary Sheet puts the "functioning overall at a 16-22 month age level," and shows that the psychological testing employed as instruments the Merrill Palmer Scale and Developmental Profile II. The report of Psychoeducational Evaluation, submitted over Trott's name, also included the Bayley Scales of Infant Development, and the Developmental Assessment Screening Inventory was the means employed in the Educational Evaluation performed by Linda Gerra.

Gerra did not testify, but the hearing had Trott as a witness on May 14. (Tr 19-121) Responding to Barrett's questions, Trott reviewed the results of the evaluation reported in REx 3, and he classified Clifford's handicapping conditions as being primarily mental retardation and also "cerebral palsy and lack of vision or loss of vision." (Tr 23/18-25; 24/2-4) All of the evaluations, he said, "translate to IQ's below 20," an indication that Clifford is "profoundly retarded." (Tr 24/13-19) Trott believes Clifford has "leveled off in his ability to learn."(Tr 27/12-15)

The MDT at IEB, in addition to the aforesaid evaluations, had for review material provided by SED and also the Burrs, the latter including reports from the Association for the Advancement of the Blind and Retarded (AABR) where Clifford had previously been placed. (REx 4) The "Medical Profile" from AABR shows Clifford to have been taking medication in the form of Haldol, and "Irregular gait" is noted under the heading of "Special Alerts." Reevaluation at AABR

on 26 April 1984, when Clifford was 16 years, 4 months of age, included language, speech and hearing. The "Final Summary" reports "overall improvement in the auditory and tactile modalities (and) performance in expressive language has shown the more significant growth." Recommendations were for "Continued speech therapy" and "A behavioral program ... which would reduce inappropriate behaviors and facilitate receptive and expressive language." Covering the period 1983-84, AABR also reported on progress in the areas of academic, vision, orientations and mobility, and speech, and there is a section of the report providing a "Social and Emotional Profile." The latter depicts Clifford as

> ... a young man of average height who is stocky in his build. He has a fair complexion and brown hair which ... often times covers his eyes. Clifford has a very limbering (sic) gait and he requires assistance to ascend and descend stairs. This is attributed to his Cerebral Palsy involvement. Clifford has made significant strides in his ambulation ability as well as stair climbing...

The information from AABR led Trott to say, when asked by Barrett if their materials "are consistent with the determination of the Institute," that "it produces a perception of a youngster who is profoundly retarded; whose potential is limited to that level of functioning." (Tr 30/21-25; 31/2-6)

Additional information about Clifford was forthcoming from Craig Curry, Administrative Coordinator, Board of Education of New York City, who sent material to IEB with a covering letter of 11/2/84, (REx 5) and other records from the City school district's Central Based Support Team also reached IEB (REx 6). Curry's packet included various items from different sources, including: diagnosis of Clifford Burr by Arthur L. Rose, M.D., Pediatric Neurologist at Downstate Medical Center/SUNY, dated 28 September 1984, that lists "1) Anophthalmia 2) Mental Retardation 3) Cerebral Palsy"; reports from AABR; social history prepared 9/20/84 in the City school district's office for Hearing Handicapped and Visually

Impaired; COH determination of 10/5/84; and COH addendum dated 10/17/84. From this material one learns that the COH, based on reevaluation requested by the parents after Clifford's program at AABR came to a close, classified him as multiply handicapped and recommended a program of "Special Class/Special School and Related Services" in the service category of "Track IV." The indicated related services are bus, speech/language therapy, and vision education. Explanatory comments by Hattie Rayburn, COH Chairperson, disclose that Clifford had not been attending school since June, 1984, because the parents objected to a previous recommendation of Track IV at PS 396. In the addendum prepared 10/17/84, the recommended program is changed to: "Defer to CBST for Private School (Day)," and Rayburn notes that City Wide Placement informed CBST that "the Track IV program, as it is currently constituted, cannot appropriately meet Clifford's needs."

Departing from consideration of IEB's evaluation of Clifford Burr, including information made available to the MDT, Barrett asked Trott about other applicants to IEB who had been rejected. He said these "are basically youngsters who are in need of maintenance activities; would not be able to perform academically...," (Tr 41/23-25; 42/2-13; 42-48, REx9) Barrett then turned attention to Trott's visit to the Track IV program at PS 396 in Brooklyn where he regarded the type of program the students were engaged in as the same as those recommended by IEB for Clifford. (Tr 53/6-14; REx 11 and 12) In the course of Trott's direct examination, counsel introduced maps to show locations with particular reference to the distance from the Burr residence in Brooklyn to IEB in the Bronx. (REx 13, 14, 15)

Cross-examination was conducted initially by Victoria Ruocco, who coupled her questions with the introduction of several exhibits. (PEx 1-5) These show that the Burrs applied on 9/10/84 to the Commissioner of Education for approval to attend a school for the blind, deaf, or severely physically handicapped (form PHC-10). Rebecca Cort, SED Regional Associate, responded on September 27 with advice to the Burrs

that their application "to a state-supported or state-operated school ... has been reviewed and referred to the NY Institute for Blind ... to conduct an evaluation to determine whether it has an appropriate program to meet your child's needs." On November 6 Trott wrote the Burrs about the scheduling of an evaluation on November 28, a date subsequently advanced to November 26. The result of the evaluation, as previously indicated, was set forth in writing 2 January 1985 in a "Referral Status Notification," a copy of which Trott sent to Curry under date of January 7. This means that elapsed time was almost four months from application to written report of recommendation, which period embraced intervals of 17 days from application to notice of referral, 40 days from notice of referral to notice of scheduled evaluation, and 37 days from evaluation to written recommendation of non-appointment. Asked about the delay in notification, Trott said "there is not a process or mechanism for responding rapidly to evaluations to (sic) 4201 schools, such as the Institute ... the processing of papers; getting it typed -- even typing -- secretarial ..."(Tr 71/15-21)

Regarding admission to IEB, Trott indicated that COH recommendation is not a prerequisite, but "we would hope to check as much information as possible . .. (and) in the interest of the child it would be important to check any information available." (Tr 77/18-23; 78/15-16) At IEB, according to Trott, there are "non-academic children, " probably 17 years of age, and some "not toilet trained," some needing "hand-over-hand ADL skills," some taking medication, but "there may not be peers of Clifford's attending." (Tr 90/7-25; 91/2-12; 92/4-5)

In continuing cross-examination, Golinker asking the questions, Trott said Clifford, with whom he had spent four hours at IEB on November 26, (Tr 102/20-21) exhibited "the characteristics ... defined as being at a level of profoundly mentally retarded," and that there are other persons who fit that description at IEB. (Tr 104/3-14) Returning to the matter of admission, Trott agreed that in the normal course the MDT would request prior relevant information from the parents and other sources, and it is fair to state that in Clifford's case the

MDT at IEB had all the information believed to be needed to make a recommendation based on evaluation. (Tr 108/14-25) In the student population at IEB, Trott said, there are profoundly retarded youngsters who do have academic potential, but still are not peers of Clifford. (Tr 110/ 4-17) He based this opinion on Individualized Education Plans (IEPs) and "other documents" considered by "professionals at the meeting." (Tr 111/6-16)

Trott had been in attendance May 2 and heard the testimony of Laura Colamonico, Educational Supervisor in Frampton Hall at IEB. He recalled her having said "something about" a student in Frampton Hall being comparable to Clifford, but he was not certain of the individual's identity. (Tr 92/17-25; 93/2-3) Colamonico had testified that there was just one Frampton Hall student functioning at Clifford's level, (TrS 63/20-23) and she described the Frampton Hall program in detail. In late 1984 there were 38 students in nine classes, their chronological ages ranging from 7-21. (TrS 42/20-25; 43/2) Although she had never seen Clifford Burr, (TrS58/19-20) she did review his file at IEB when asked to determine whether there was an appropriate class grouping for him in Frampton Hall. And she concluded that there was no appropriate group in that program. (TrS 43/3-25; 44/2-6) In her testimony she contrasted the characteristics of students at Frampton Hall with those of Clifford, noting the problem of peer interaction between non-verbal students and one whose "primary strength is his communication." (TrS 52/8-20) And she said that no student like Clifford had been admitted to the Frampton Hall program in the last few years. (TrS 55/17-20)

Upon the excusal of Calomonico, who was recalled later in the hearing (see below), Respondent sought to hear the testimony of Rayburn, and Petitioner objected. Regarding this witness, and the COH file on Clifford, I said:

> ... I do not discount the possibility that there is testimony and documentary evidence stemming from consideration by COH that may be relevant to the issue at hand. That issue in my judgment is not

> whether what the COH has been doing is reasonable. That's not my concern. My only concern is whether or not the determination of the Institute that Clifford is not an appropriate child to be placed in the Frampton Hall program is a reasonable determination. Anything that bears on that determination, I believe, is relevant to my consideration, and consistent with my efforts to have full disclosure ...
>
> It is necessary, in my judgment, for me to have the fullest possible understanding of this young man in order to arrive at a fair determination. That is my responsibility. (Tr 75/21-25; 76/2-12, 19-22 -- comma dropped lines 7 and 9, added line 8, of quotation from page 76.)

Rayburn was sworn in on May 2 to testify that driving time to IEB that morning from her office, located near to the Burr residence, took more than an hour, perhaps close to an hour and fifteen minutes. There was no further Rayburn testimony on this occasion, and the hearing was recessed for luncheon and for the purpose of viewing the program in Frampton Hall. Resumption was brief before a further recess for the day in order to allow for settlement discussion and for preparation of Frampton Hall IEPs for examination by Petitioner. In addition, I invited counsel to submit written arguments about testimony by Rayburn and the admissibility of the COH file on Clifford Burr. I received submissions before the hearing resumed May 14.

In an opening statement May 14, I reviewed the procedural issues that had arisen, commented on the submissions of counsel, and took this position:

> The regulations - 200.7(d) make no reference to the COH in providing for "appointment of blind, deaf and severely handicapped pupils to certain State-operated and State-supported schools ..." I need not -- indeed, should not -- pass on the reasonableness of

> any COH action regarding placement and program for Clifford Burr. Whether the water is over the dam, and/or still in front of it, is of no moment to me; the parents of Clifford Burr having been referred by the Commissioner to IEB for evaluation, and the recommendation resulting therefrom having been against placement, my task is to make a judgment about the action of the IEB, namely, whether reasonable or not in its conclusion that placement of Clifford at the Institute would not be appropriate.
>
> In arriving at such a judgment, I shall consider "least restrictive environment" ... PL 94-142 imposes an over-arching mandate for placement of a handicapped pupil in the least restrictive educational environment. Accordingly, IEB may seek to establish that Clifford's handicapping conditions warrant a less restrictive environment than the Institute can provide with existing programs, and that IEB placement would therefore not be appropriate ...
>
> I am not interested in COH action on placement and program, and I shall sustain objections to testimony and documentary evidence of this character. Regarding evaluation, on the other hand, am receptive to any offering of evidence, oral or written, that will give me a fuller understanding of Clifford's condition and the Frampton Hall program of IEB together with its 39 resident students. (Tr 9; 10/2-8; 11/4-13)

Rayburn's further appearance as a witness was permitted on the basis of the foregoing, and so, too, was the COH file on Clifford admitted into evidence as REx 2.[6] Her testimony

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[6]The absence of expected objection to evidence about COH activity in Clifford's case, as well as the Track IV program, led to an expanded scope of the hearing. This occurred notwithstanding repeated expression of concern about protraction of proceedings, including reference to the Commissioner in my opening remarks May 14 when, quoting his decision

(Footnote continued)

disclosed that Rayburn, as COH Chairperson of District 21, Brooklyn, had contact with the Burrs initially in 1977, and that the COH again was recommending Track IV placement for Clifford. (Tr 125/15-23) Rayburn reviewed Clifford's experience, as she knew of it, including his having remained at home until the age of eight, education at the Jewish Guild for the Blind, and then placement with the AABR. (Tr 126-130) In developing Clifford's IEP for the COH, dating to 19 February 1985 (transcript incorrectly has "1984"), the classification is "muitihandicapped," and Rayburn said that profound retardation was primary, visual impairment secondary, and then orthopedic impairment. (Tr 126/25; 127/2-5; 130/13-19) Rayburn then reviewed COH action on Clifford, as well as the parents' response, and I commented in response to an objection that "my inclination is very clear at this time to regard this testimony as susceptible to be stricken on the grounds that it is not relevant ..." (Tr 141/13-17)[7] Further on direct, Rayburn gave her understanding of "least restrictive environment," (Tr 145/19-25; 146/2-13) and she enlarged on the matter of classification in Clifford's case. (Tr 148/23-25; 149/2-18)

From cross-examination it appears that Clifford received home instruction beginning in September, 1984, when there was no appropriate placement available for him. This instruction came to an end in April, 1985, after the parents had failed to agree with, or appeal from, a COH recommendation on 2/19/85 for Track IV/PS 396 placement. (Tr 151-152) Golinker's cross went into detail regarding the public school situation, including COH procedures and the recommended Track IV/PS 396 placement for Clifford.

#11402, I said that "It is the responsibility of the parties. . . for all parties to cooperate in an effort to conduct and conclude the impartial hearing in an expedient manner to assure the due process procedures are completed in a timely manner." (Tr 13/20-25; 14/2)

[7]See "Analysis and Conclusions" for further reference to this matter.

Scheduling problems delayed resumption of the hearing until June 28[8] when Respondent's next witness was Dr. Roseanne Silberman, an associate professor at Hunter/CUNY, a teacher trainer in the areas of blind/visually impaired students and the severely multihandicapped. (Tr 214/8-20 and REx 17) From testimony reported in 46 pages of the transcript one learns of Silberman's professional contact with IEB, including her familiarity with Frampton Hall, the fact that she reviewed IEB's file on Clifford Burr, and her visit on behalf of IEB to Track IV/396. She "was really excited about what they were doing" there, she said, detailing the reasons, (Tr 223-226) and expressed her perception that for Clifford "it certainly does meet the requirement for the least restrictive environment." (Tr 227/16-23)[9] Silberman had not seen Clifford, although "she would like that opportunity." (Tr 233/11-18)

Golinker asked Silberman to "compare a mentally retarded child who is blind to a child who is blind and mentally retarded on a profound level." Her reply: "I think they are one in (sic) the same. I think we are just using labels." (Tr 242/22-25; 243/2) Asked again, she confirmed her opinion, (Tr 243/9-13) but then, on redirect, she seemed to contraindicate by saying "the bottom line is that the primary handicap is profound mental retardation." (Tr 243/22-25; 244/2-3) Recross pursued the point, and I asked: "Profoundly mentally retarded, and blind is the same as blind and profoundly mentally retarded; is that correct? They are one in (sic) the same. It's just a matter of semantics." Silberman's response: "Yes." (Tr 245/19-23)

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[8]Unusual difficulty in scheduling in this matter is explained by the active participation of IEB's Director and staff associates, as well as consultants to Petitioner, and representation by co-counsel for Respondent and an advocate, assisting co-counsel, and legal interns for Petitioner. In addition, delays were occasioned by piecemeal requests for data, including in particular Petitioner's at a point when IEB was not in operation and staff was dispersed. (Both the transcript and Petitioner's post-hearing memorandum reflect an attitude of self-righteous indignation about delay that is ill-becoming to counsel under the circumstances of the case.)

[9]Testimony was permitted over objection, apropos the issue of least restrictive environment, but see note "(7)."

Then Golinker developed in further questioning that IEB has profoundly mentally retarded people who are also blind, and whose primary handicap is also mental retardation. (Tr 247/6-11) But based on her review of Clifford's file and her familiarity with Frampton Hall, she considers the latter not to be "an appropriate placement." (Tr 260/6-18)

Sidney Miller followed as Respondent's next witness. The Principal of the Track IV program, Miller described the program, (REx 11 and 12) and remarked on his contacts with the Burrs, including Clifford when he visited P.S. 396.[10]

Next to testify was Dr. Robert Guarino, IEB's Director, whose appearance as a witness extended over several days.[11] Having assumed his present position in January, 1984, Guarino previously served as Director of the Division of Interagency Cooperation and Support Services in SED (1977-84), responsible "to supervise the program in special schools in New York State." (Tr 291/3-4) This function involved "the fiscal program and monitoring of the 4201 school programs." (Tr 291/21-23) Counsel elicited information about Guarino's professional background and experience, (REx 18) then focused his attention on the characteristics and operation of 4201 schools under relevant statutory provisions with particular reference to IEB. (Tr 291-298)[12] In the Frampton Hall, he explained, is a "Special Education program for ... deaf-blind students" funded by the Federal government as a regional center with additional funding from private sources. (Tr 298-299)

July 1 saw Dr. Ellis Barowsky leading off for Respondent to testify as consultant for IEB in his capacity as associate professor of special education at Hunter College (REx 19) He, too, had not seen Clifford Burr, but both volumes of the COH file (REx 2) had been referred to him for review. He described

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[10]See note "(7)."

[11]June 28, July 1 and 11, September 23 and 30, October 1, 4 and 15.

[12]IEB's establishment dates to 1831, not 1931 as reported in Tr 297/3.

his findings about Clifford in this file which indicate "that he is profoundly retarded." (Tr 325-328/3-4) He had visited Frampton Hall June 18, forming then the opinion that "Clifford needs a little more attention and different structure than what Frampton Hall can offer ... because ... his profound level of retardation requires developing pre-vocational training." (Tr 329/7-25; 330/2-3) He also expressed his reservations in regard to Clifford's behavior pattern, (Tr 330/16-20) remarked on other aspects of the Frampton Hall program, and agreed with counsel's statement that "it would be an inappropriate placement." (Tr 331/12-15) Moreover, he added, "one hour and a half of a bus ride would generally work against him." (Tr 331/16-21)

On cross-examination Barowsky told of observing in Frampton Hall a child who "sort of sat and was rocking and not interacting", and another was was "Shrieking -- shouting." (Tr 342/4-5, 10-15) But he didn't know "what the children's levels were at Frampton Hall ... I did not see their IEPs." (Tr 350/14-17) Nor had he had any experience with blind, profoundly mentally retarded people, (Tr 358/16-23) but had been involved with profoundly retarded who were not blind. (Tr 370/25; 371/2-3) Based on his impressions of Clifford, gained from the COH and IEB files, and his understanding of Frampton Hall from observation and discussion, he would not recommend Clifford for admission to that program. (Tr 386/13-15)

Recalled for continuing direct examination, Guarino was asked about IEB's admissions criteria. (REx 20) He explained that new criteria were adopted by IEB's Board in May, 1983, following studies that resulted in reaffirmation of "its course of education for visually impaired children that had academic potential." (Tr 391/16-19; 392/3-8) He added that his "coming to the Institute and subsequent months of further study ... (led to) a new five year plan, which was formally adopted in February of 1985." (Tr 394/4-8) This contemplates changes in the student population of IEB, including Frampton Hall where physically handicapped students would be placed, (Tr 396/2-5) and presently, he noted, IEB rents space in the Hall to a program called "Grow With Us" for pre-school handicapped

children. Any vacant student position now at Frampton Hall, he was asked. The answer: "No, there are not." (Tr 398/5-7)

From Guarino's testimony one learns that "The primary purpose when Frampton Hall was started was to provide services to young rubella, or deaf-blind population," and the space is therefore ideal for Grow With Us. Not so for adolescents, and their education in the same space where pre-school children are located he regards as "detrimental for both groups." (Tr 398/11-13, 17-24) Reverting to the admissions criteria, Guarino said that "Clifford would not meet the educational criteria," nor would his behavior manifestations be appropriate . (Tr 399/2-9; 400/4-11) The criteria, he noted, are not necessarily to be filed with SED, but "It was seen in the past several months." (Tr 401/13-20)

Barrett asked Guarino about the implications of two decisions of the Commissioner of Education that she had submitted for consideration early in the hearing, and he said that they "point out to me the correctness of the school decision ... of not accepting (Clifford) into the school program." (Tr 420/10-19; 421/2-6)[13] As far as the COH file and PS 396 are concerned, Guarino said that IEB in considering the application for Clifford had proceeded without the complete file being available and was not aware of the COH recommendation regarding PS 396. (Tr 424/20-25; 425/9-12)

Commencing what developed into extended cross-examination, Golinker asked about various things, including procedure in seeking placement, information about Clifford available to IEB, the time line for IEB regarding the referral of Clifford for evaluation, funding, IEB's MDT, and the population at Frampton Hall. The latter, Guarino said, includes profoundly mentally retarded students between the ages of five and 21. (Tr 437/19-25; 438/2-10) Then Golinker asked "for the description of the profoundly mentally retarded students at the Frampton Hall program." Tr 439/14-18) This was followed on July 2 by Golinker's written request in a letter to Barrett. At

[13]Decisions #11215 and 11216.

the outset of the next session, July 11, I repeated what I had said on May 14, namely, that "I am not interested in COH action on placement and program ... (but) I am receptive to any offering of evidence, oral or written, that will give me a fuller understanding of Clifford's condition and the Frampton Hall program of IED, (sic) together with its 39 resident students." (Tr 448/8-17)[14] Referring to Golinker's request, I said that "I do not find the request to be unreasonable ... (because) I am interested, in order to do the job that I have to do in this matter, to learn as much as I can about the individual student in question, that is, Clifford Burr, and about the program and its population to which he sought unsuccessfully to gain admission." (Tr 449/14-24) I added that I "would expect respondent to be interested to supply that in order to further support its contention that the requested placement was reasonably rejected." (Tr 450/14-17)

Cross-examination of Guarino resumed with reference to IEB's budget, and the witness acknowledged that nothing prevents the making of a request for supplemental funding from SED if needed for an additional student. (Tr 462/3-14) Continuing about space and class size and student/teacher ratios in Frampton Hall, Golinker's cross drew from Guarino his acknowledgment that there are students at IEB who cannot meet the criteria for new admissions, but will be allowed to continue their education there until they age out or "until a least restrictive more appropriate program might be found for them." (Tr 471/24-25; 472/2-8) And Guarino agreed that all profoundly mentally retarded blind persons could not meet admission requirements because "they would not meet the criteria of the intellectual." (Tr 472/24-25; 473/2-10) SED had been notified of the new admission requirements of IEB, and Guarino accordingly admitted, as previously indicated in footnote "(5)," to having been surprised upon receiving the referral of Clifford Burr for evaluation. (Tr 476/3-16) He later said:

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[14]Not all Frampton Hall students are residential, but the figure is approximately 90%. (Tr 498/14-22)

> The only thing that the State Education Department requires, as far as I understand, is an ophthalmology report to accompany the referral to our school ... My understanding is that the State Education Department refers – at its pleasure can refer to any school at any time for any reason without regard to criteria of schools. (Tr 531/7-11; 532/9-13)

Frampton Hall has been in existence since 1970, and thus far planning at IEB has been successful in making sure that both IEB's students and those of Grow With Us use the Hall in harmony. (Tr 483/24-25; 484/2-6) Classes are not self-contained insofar as students leave the classroom for physical education, lunch, physical therapy and occupational therapy. (Tr 492/14-25) The Hall's educational program is related to "activity and (sic) daily living," to self-help and to behavioral management, but the students are not academically oriented. (Tr 501/7-17) The program provides the basic foundation for special education for students who might need a community residence environment at their next placement. (Tr 518/4-10)

This session of the hearing ended with debate between counsel about the production of IEPs for Frampton Hall's students, requested by Golinker July 2. In accommodating to IEB's asserted need for time, I observed that "earlier on there was not only reluctance of respondents to provide the IEP as noted by petitioner, but petitioner was equally reluctant to provide the most recent COH, IEP on Clifford Burr ... pursuant to the suggestion of the Hearing Officer, but that is water under the bridge." (Tr 549/18-25) Further dates were decided upon, after the IEPs were to be provided, and the hearing was recessed.

Cross-examination of Guarino resumed September 23 and carried through until redirect occurred on October 15. Golinker's line of inquiry was directed first to the particulars of Frampton Hall's staffing and the services provided to the students there. The latter, as the record indicates, encompasses speech and language therapy, physical education and therapy, occupational therapy, otological, psychological and social

work, movement science, and activities of daily living (ADL). (Tr 567-568) Counsel then took up the IEPs for 1985-86, asking about the comparison of individual Frampton Hall students to Clifford in terms of functioning levels in order "to determine whether the concept of peers for Clifford exists." (Tr 586/19-20) "In some respects they are," Guarino said, adding that "If we take the general terms, like gross motor, fine motor, et cetera, and look at age and -- developmental age and achievement levels; yes, in some areas." (Tr 586/25; 587/2-4)

Referring to six students by number,[15] with information disclosed by IEPs and psycho-educational evaluations, the inquiry turned to hearing ability, and Guarino said "they all seem to have enough hearing to understand speech." (Tr 594/13-18) Moving on to the question of grouping, the witness expressed doubts in this regard for the six students under discussion because of one's need for physical prompting and another's seizures. (Tr 601/2-6) Later, referring to student #12, the testimony indicated that this student functioned at a level of 18-24 months and, similar to Clifford, engaged in finger-flicking activity as a form of self-stimulatory behavior. (Tr 614/21-25; 615/14-21) Is he a peer of Clifford's in the way that he functions? "It (sic) certain areas probably he would be," said Guarino. (Tr 616/17-21)

Guarino had not personally observed Clifford, (Tr 618/16-17) but from his educational evaluation it appeared to him that Clifford is physically appropriate for his age. (Tr 619/11-13) Student #12, also 17 years of age, has an educational plan at IEB to address needs indicated by no interaction with peers, self-stimulatory finger flicking behavior, increased stereotypical behavior when excited, tantrum behavior, encouragement required in exploring his[16] environment, and the intellectual equivalent of the functioning level of 60 months. (Tr 626/14-25; 627/2-13) But Guarino did not admit that IEB could do the same for Clifford in Frampton Hall. (Tr 627/20-25; 628/2-8) Pressed in regard to the degree of retardation in the case of #12,

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[15]First names were used to begin with, then numbers only.

[16]"His" is used without regard to sex which is unknown.

Guarino noted from the psycho-educational that "he is severely handicapped," but whether this means "severely retarded" he didn't know. (Tr 629/4-14)[17]

At IEB there are aggressive students, Guarino agreed, and students who are on some forms of medication. (Tr 631/20-21; 632/14-25; 633/2-5) He understood Clifford to be taking Haldol, (Tr 633/9-11) and IEB's students #32, 16 and 31 also take Haldol. (Tr 637/25; 638/2-3) Other medication taken at Frampton Hall was indicated, (Tr 638-647) but students still make progress in the program. (Tr 647/17-20)

At the following session, September 30, Guarino's testimony indicated that the Frampton Hall staff has the expertise to educate students who

- are profoundly retarded
- are older, younger or the same age as Clifford
- have behavior problems
- do not explore their environment
- require physical prompting or hand over hand instruction
- function within an 18-24 month cognitive level
- have gross motor capabilities at approximately the 24 month level
- require orientation and mobility training that includes trailing skills
- respond to verbal commands as a means of instruction
- cannot communicate with less than or equal to a 36 month communication level
- have a full range of ADL skills above, below and about the same as Clifford's 28 months, as well as those who are totally dependent in their ADL skills
- require assistance in toileting, dressing and feeding. (Tr 731-749)

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[17]Guarino's testimony is sprinkled with "I don't know,""Maybe," "I'm not sure" and other qualifying terms, reflective of his position as Director, rather than program person, at IEB.

Related testimony regarding instructional objectives was forthcoming in conjunction with indications of staff expertise, a goal being to increase independent functioning by the students. (Tr 749/10-21) In further questioning, immediately prior to a luncheon break, counsel obtained an affirmative response when he asked if the Trott letter to SED (REx 3) listed all the reasons for rejecting Clifford. After the break, however, Guarino said his answer had not been complete in that he should have mentioned that admissions criteria had come up in discussion with Trott about the MDT recommendation for Clifford. (Tr 752/20-25; 753/2-11; 755/5-11) Guarino agreed that nothing in the Commissioner's procedures or regulations precluded citing admissions criteria as a reason for rejection, but he said that "based on the fact that my work with SED, and the letters that typically are transmitted about a student, contain student information and not admission criteria information. That helps in placement of the student in the appropriate program." (Tr 756/20-25; 757/2-6) Similarly, regarding appropriate placement for Clifford, Guarino said that SED cautioned IEB "not to recommend a particular program; that that then becomes the responsibility of the COH and/or SED." (Tr 757/7-13)

Referring to records compiled by Respondent for Petitioner, Guarino's answers to further questions disclosed that student #31 engages in frequent stereotypical and disruptive behavior, ignores directions, is resistant to teaching, and throws things unpredictably. (Tr 761/15-25; 762/16-25; 763/2-14) Golinker then brought out SED's comments, in a 1982 "Program Review Report" on IEB, about a "Behavior/Management Class" in Frampton Hall for students who are "severely impaired, acting-out formerly institutionalized youngsters whose disruptive, agressive (sic) and self-abusive behaviors represent the primary area of need in programming." (PEx 7 and Tr 771/6-22) Further questioning concerned grouping and characteristics of students in Frampton Hall, counsel introducing a chart of groupings for 1985-86. (PEx 8) Guarino's further testimony indicated the presence of self-abusive behavior, which staff tries to deal with, and limited attention spans, also a matter for staff attention. (Tr 782-786) Palmar and pincer grasps are indicated among Frampton's

students, and staff has the ability to develop fine motor skills. (Tr 786-789)

The cross-examination of Guarino, resuming October 1, involved classroom groupings (PEx 8), the mix of ambulatory and non-ambulatory students (PEx 9), and the medications administered in Frampton Hall. (PEx 10 and 11) With respect to staff expertise at IEB, covered in testimony at the previous session, Guarino was asked if the qualifications of staff would permit the development of a plan for Clifford. "No," he said, because what is missing includes "Teacher, teacher aide, mobility, PT, which is physical therapy, OT, which is occupational therapy, extra behavior management people outside of the classroom. We would need extra consultants to come in and help us with behavior management. We would probably need ... (r)ehabilitation program assistance ..." (Tr 827/17-25; 828/2-5) But he then acknowledged that Frampton Hall had six teachers, two aides in each class for a total of 12, mobility instruction, physical therapy, occupational therapy, and behavior management. (Tr 828-829) Guarino stopped short on rehabilitation, although his answers to following questions affirmed the education of profoundly retarded children in Frampton Hall, and this includes training in ADL skills as well as hand over hand instruction. (Tr 830-831) All of this, it developed, was provided in September of 1984, (Tr 833-835) and this applies to the related services specified for Clifford in the MDT recommendation. (REx 3 or PEx 5 and TR 837/7-20) The situation differs today, Guarino said, in that speech is missing, but then he admitted that otological service, or speech therapy, is provided. (Tr 837/21-25; 838/16-23)

Ensuing discussion concerned space and class size and ratios of teacher-aide-student prescribed in SED review (5-1-2 and 6-1-2), leading up to agreement that if the 1985-86 ratio of 5-1-2 in two groups was increased to make all six groups 6-1-2, there would be at least two spaces opened up for new students. (Tr 850-875/2-5) Then the focus shifted to the SED report on a "Special Education Program Review" of IEB, transmitted to Guarino with a covering letter of 30 April 1985. (PEx 12) Golinker read sections of the report beginning with

SED's perception that "The present admission and discharge criteria are relatively vague, and did not apply to the multi-handicapped population currently enrolled ..., to which Guarino responded in part that "... this recommendation is just that ... a program recommendation ... (and) (w)e need not follow that recommendation." (Tr 881/15-18 - 889/13-17) Golinker returned attention to the MDT recommendation (PEx 3 or REx 5), referring Guarino to Frampton Hall's IEPs for 1984-85, (PEx 16) the IEPs for 1985-86, (PEx 17) and psychoeducational evaluations of Frampton Hall students, (PEx 18) and consumed the remainder of the time October 1 in having the witness answer questions about the comparison of Clifford to students in the Frampton Hall program. (Tr 895-923)

Exhibits introduced at the beginning of the session October 4 included the floor plan of Frampton Hall. (PEx 16A) [18] The allocation of space was considered at length, then again a comparison of Clifford with Frampton Hall students, and Guarino agreed "that you could employ the term peers in the sense of referring to students at the institute who were grouped on the basis of having similar needs or requirements and in turn were receiving similar services addressed to those needs and requirements." (Tr 971/21-25; 972/2) Noting that Clifford fits within the range of functioning of students in group/class #1, (PEx 8) with reference to age, mix of ambulatory and non-ambulatory, day and residential, intellectual, personal, social and motor, Golinker asked what else would need be known. Guarino: "Some staff judgment relative to how he would fit with that group." (Tr 980/11-21) The mix of #1 also involved some with hearing and some without. (Tr 984/20-24)

This process of comparison continued with counsel turning to group #2 in regard to: age, ambulatory/non-ambulatory, day/residential, intellectual, educational, personal/social, fine motor, gross motor, ADL, medication, hearing and communication. Are they peers of one another? Guarino: "In

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[18]This was marked "Ex 16" by the reporter, but I have added the "A" to distinguish from "PEx 16" noted above.

relation to age, chronological age, and some of the achievement levels and some of the communication areas, I would say yes." (Tr 989-1000/3-7)

Redirect examination by Barrett October 4 involved the IEB admissions criteria and the omission of any reference to them in the MDT recommendation for Clifford, more appropriate placement and program, and the time taken by IEB in processing the Burr referral, all apropos the requirements of the Commissioner's Regulations for #4201 schools. Regarding time to act, Guarino said "I believe it's 40 days from the date of receipt of referral by the 4201 school ... to notify in writing the department ... school workdays." (Tr 1033/14-23) Extenuation was thereafter asserted by the witness. Admissions came up again, and it was indicated that new criteria were adopted in February, 1985, although "discussed several months before then by the board." (Tr 1077/3-13 and REx 23) This led into explication of future plans for IEB, including particularly in this instance Frampton Hall. As far as the IEB recommendation for Clifford is concerned, Guarino testified "I can't think of anything that was omitted." (Tr 1082/7-10; 1084/18-21) About groupings, relevant considerations are "(f)unction (sic) ability ... age, behavioral characteristics, physical size ... the key ones ... all considered together in a composite." (Tr 1094/12-17) The factors affecting admission are the same and, in addition, "we would look at those factors which have a match with the admission criterion, along the same lines, physical, intellectual or educational or behavioral, medical also." (Tr 1096/4-13) And once a student is admitted, Guarino said, he or she would not be discharged because of changing circumstances without a more appropriate placement being available. (Tr 1099/4-9)

Laura Colamonico, who supervises the educational program in Frampton Hall, was recalled December 4 for redirect examination by Barrett. She described further the population in the program: "... primarily deaf/blind ... a term used at the Institute ... for students who have congenital rubella at birth which manifested itself in either loss of hearing or loss of vision, and some mental retardation and other characteristics besides." (Tr 1449/ 5-15) Of 34 students presently enrolled in

the program, 24 are deaf/blind with sign language "probably the primary form of communication with these students." (Tr 1449/18-25; 1450/7-9) Colamonico feels that "(y)ou try not to group verbal students ... with students that are using vision for sign purposes ..." (Tr 1450/20-22) She had heard testimony about Clifford's communication skills, his highest functioning level, and said that only one class in Frampton Hall now has verbal students. Also, apropos Clifford's educational needs in terms of ADL, she said her program does provide training in "dressing skills and eating skills, and some grooming activities, just to mention a few, (but) the focus for the ADL has been primarily in residential programs." She went on to say that the verbal group is higher functioning with ADL than Clifford, and in other groups the emphasis is on physical prompting, or signing, which would not be appropriate for Clifford. (Tr 1452-1454) She explained about the process of grouping, which considers the whole child and not merely individual characteristics, taking account of functional age, communication, mobility and ADL, as well as medical needs. All of this takes place with due regard for the considerations specified in #200.6(f) of the Regulations of the Commissioner of Education: academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and management needs. (Tr 1455-1456)

Regarding Golinker's approach in questioning Guarino, the testimony of Colamonico raised questions about "taking just specific individual characteristics and comparing them to a student in Frampton who had just one characteristic or one functional level that was similar." (Tr 1457/7-11) Turning to existing groups, she described #1 as non-verbal with little interaction, some tantrum behavior and self-abuse, needing work on gross motor skills. Appropriate for Clifford? Not so, in her judgment, given his skill for verbal communication and his behaviors. (Tr 1462/1463) Group #2 is composed of six aging out, deaf/blind students, ADL is a strength, and it would not be appropriate for Clifford because it is a non-verbal group, and "there would be no students in terms of conversational skills to interact with." (Tr 1469/2-3) The third group is 6-1-2 with five deaf/blind, three with hearing, but in all a non-verbal

group. Also, there are behavior problems in the group, and "to develop a program for Clifford would be difficult (so) this group would be inappropriate." (Tr 1473/15-19) Group #4 is the same size, primarily still a young group with five deaf/blind because of rubella, and "on a higher level overall than the other students in Frampton -- than some of the other students in Frampton." (Tr 1476/25; 1477/2-3)

Turning to group #5, which is 6-1-2 with a 3-3 split between ambulatory and non-ambulatory, Colamonico said it is not a deaf/blind group, and four of the students are verbal. She described their speech, suggesting just the possibility of their having expressive abilities at a higher level than Clifford's. (Tr 1477-1479/19-25) Regarding ADL, there is "(n)ot necessarily" any instruction, as it "has really been stressed more in the residential program." But two of the students are day students, and "the ADL skills ... eating and toileting ... (are) a focus for that group." (Tr 1480/5-11; 1481/3-10) Three students have seizures, but "(n)one of these students exhibit aggressive behavior." (Tr 1481/18-19; 1482/11-12) For this group, she said, "you hope to create a safe kind of environment and quieter environment." (Tr 1483/18-20)

In group #6, the witness explained, there is a ratio of five students to one teacher and two aides. Four students are deaf/blind, four have some hearing, gestures and signing are used to communicate, and three students are hyperactive. The group "would not be appropriate for verbal students," one reason it would not be appropriate for Clifford. (Tr 1484-1485/14-15; 1487/ 9-12) Attention then having been returned to group #5, Colamonico said regarding Clifford that "I guess ADL is an area he would need some work ... not a main focus of that group." She added that "the fact that he had exhibited, when demands were placed on him, some behaviors that can be demanding on the group ... I believe for those two specific areas, that would not be a group for him." (Tr 1487/13-25) Summing up about the groups, Barrett suggested that "the only verbal group at Frampton Hall has been excluded by you as appropriate for Clifford, whose strength is verbal skills, for

other reasons," and Colamonico said: "That is correct." (Tr 1488/2-6)

The witness feels a commute of 1-1/2 hours each way would be "demanding on anyone ... not a good idea" (for a student such as Clifford). (Tr 1488/16-25) Nor would outdoor travel be part of Clifford's instructional program at IEB as far as mobility training is concerned. This was part of further testimony about bus travel to IEB for commuting students, (Tr 1488-1493) and Colamonico then said that the Frampton Hall classes presently "are crammed." (Tr 1493/21-22) She spoke of the admission and discharge procedures, least restrictive environment as she understood the term, the self-contained situation at Frampton Hall, and the Track IV program in PS 396 where she had made a visit and believes Clifford "would fit in nicely ... in terms of his communication and the skill areas that he would need ... that it is close by to his home, and also that he would be receiving the same special services that he needs, such as occupational therapy, physical therapy, speech, and there is a vision specialist there ..." (Tr 1512/16-25; 1513/2-6) Redirect concluded with opinions from Colamonico that there is no class at Frampton Hall appropriate for Clifford, based on present grouping, because of "his needs in communication, and in providing him with a program that would provide him with the needs of physical prompting ... and also that the idea that a least restrictive environment -- there could be another appropriate environment for him." (Tr 1519-1520/12-19)

Beginning recross-examination, Golinker introduced the Guarino memo of 7 March 1985 to staff and parents enclosing a copy of the "Executive Summary — Strategic Planning Report."* Testimony dealt with the difference in groupings from 1984-85 to the current school year, and Colamonico agreed that "lots of the students at Frampton Hall have functioning level characteristics that are similar to those exhibited by Clifford." (Tr 1525/11-19) Continuing, topics covered included the verbal students in Frampton, functional

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* PEx 25

levels, ADL skills, ambulation, hearing loss, mental ages, physical prompting, hand over hand instruction, change in groupings within the year, and total communication. (Tr 1527-1536) Asked if there are any characteristics of Clifford that are not found among the Frampton Hall students, Colamonico said: "One area that comes to mind is behavior. To be specific, the pulling of hair, and the scratching, I believe. As far as behaviors, I don't see that in my program." (Tr 1537/14-20) But she acknowledged the presence of those students who are hyperactive, who display disciplinary behavior, who are highly distractable, and for whom there is a behavior management program. There are self-abusive students, aggressive students, body-rockers and head-rockers, and, according to IEP/1985 for student #15, one who "resists supervision, scratching frequently and lies on the floor." (Tr 1539-1540/2-3 and PEx 17) There are grabbers, students who yell, and those for whom there is a need to use a pincer grasp and/or to use a palmar grasp. Some are on a toileting schedule, some need assistance in eating and dressing, some with mobility and trailing as goals, who receive speech and occupational therapy, orientation and mobility training, and adaptive physical education. (Tr 1541-1542)

Golinker recalled Colamonico's testimony in May that there was a student in Frampton Hall similar to Clifford, and she said this was #38. He is 18 years old, has normal hearing and uses sentences, and is placed in group #5. The similarities she had in mind, said Colamonico, are functioning level, verbal, and age. (Tr 1545/20-25 - 1547/2-5) Answering the questions that followed, Colamonico said that "there are specific characteristics that Clifford Burr has that students at Frampton also have ... (but) (t)here are no groupings appropriate for Clifford." (Tr 1549/3-22) At the same time, it appears from her further testimony, staff at Frampton Hall educates students with the following characteristics:

- profoundly retarded
- blind
- verbal
- interfering behaviors

- highly distractable
- on medication
- learn by physical prompting
- learn by hand over hand instruction
- can speak
- have no hearing loss
- are day students
- are ambulatory
- need behavior management
- mouth objects
- have limited exploration of objects in their environment
- may not interact with other students in the classroom
- use palmar grasp
- need assistance in toileting, eating and dressing
- need help in traveling and related services
- receive speech therapy
- receive physical therapy
- receive occupational therapy
- receive orientation and mobility training
- receive adaptive physical education

and "(w)e have the ability to educate the students that are in Frampton Hall." (Tr 1551-1554/2-10) Question: "Is there anything by way of staff expertise that you couldn't provide at Frampton Hall as a program for Clifford?" Answer: "Presently, after going through the groupings and all, no, but as far as what you said, going through every single category, my staff is able to do that." (Tr 1555/19-25)

On December 11 Respondent's witness, pursuant to subpoena, was Kenneth Burr, and his direct examination was conducted by Rosenberg. From the testimony of Clifford's father one learns that "...from the earliest ... my wife has been involved with a new pattern ... an idea of reaching very young children, like reverse process of reaching different parts of the brain and stimulating the body in different ways." (Tr 1731/5-12) Until six years of age Clifford was in a preschool program in Brooklyn, then in a program at the Jewish Guild for the Blind (JGB) for 5-6 years and, after that, at AABR in Queens until 1984. He left JGB at the school's request as "(t)hey felt

that they just couldn't provide services ... he needed any more, and that he would be better off in a different, more stimulating type program." It appears, according to Burr, that "(t)hey preferred not to keep or accept a blind, low functioning child." His further education at AABR came to an end when "they closed the dayschool program." The Burrs were pleased with AABR, and they were in contact with the COH when its closing was announced. This led to the suggestion of PS 396, made in May of 1984, but "(t)here was nothing to look at" then. The parents took a look in September, 1984, at which time #396 had children who had been at AABR, but the Burrs did not like the idea of this placement. The assistance of various people was obtained, a referral to the State-school in Batavia was declined as not an appropriate placement in their judgment, and referral to IEB by SED followed in September, 1984. Other possibilities for placement came to the attention of the Burrs, including United Cerebral Palsy/Manhattan, which "could have been appropriate," but the COH said placement there "will never be allowed."

To IEB, for an evaluation November 26, the trip had taken less than an hour, less time than Clifford's commute to AABR. Attending the latter, Clifford was picked up at 7:00-7:20 a.m. and delivered about 8:30. Previously, traveling to and from JGB, he had been in a wheelchair toward the end of the five-year period because "the bus people did not want to bother helping my son off the bus." Although Burr said "(m)y son is not aggressive," he admitted that Clifford did pull his mother's hair during the interview at IEB. (Tr 1732-1786)

Under cross by Golinker, the testimony disclosed that Clifford had received home instruction in September, 1984, which continued until April, 1985, and "(i)t was reinstated just recently." This appears to have resulted from the Burr appeal from the COH recommendation for #396 placement, and this involved a hearing which "confirmed that the Board's recommendation was not appropriate." (REx 25) At IEB, Burr said, Trott had told him that "we have not accepted a child at Frampton Hall for over three years ... (and that) (w)e are going to slowly phase out the children here." (Tr 1794/12-13, 18-19)

Regarding Clifford, his father said that he had not been in a full day education program since June, 1984, and as a result "his attention span has lessened." At home he does not throw food or utensils, but requires toileting assistance and help with handwashing, toothbrushing and facewashing. His eating skills have also regressed during his period at home.

Clifford received Haldol at JGB, which wanted to increase the dosage greatly, but this was not done at AABR. Having said this, Burr then described his son's activity at home ... "(b)asically he gets around the house by himself, and he explores his environment ... discovered the bedroom (but) basically stays in the living room" where he has his chair and his bed. "He goes from his bed to his chair. He goes into the kitchen when he wants to eat, sits down in his own chair. When he goes to the bedroom ... he has to go into the kitchen, make a left-hand turn, make a right-hand turn, and another right down the long hallway to go into the bathroom ... So he is very ambulatory in the house. We notice that he does use some of the trailing techniques learned at the AABR school, whereby if he is not sure when he makes a turn, he will feel the wall, trail the wall, a little bit, get his bearings and continue to where he is going ... And outside, he is dependent on the sighted guide technique." (Tr 1787-1803)

Respondent recalled Colamonico for the final testimony in the presentation of its case. She said that it was no secret at IEB, which had been established in 1831, about phasing out the program of Frampton Hall. She said the busing procedure is not part of the instructional program, and she would not be available to help in meeting the bus upon the arrival of a student such as Clifford. She explained the self-contained nature of the Frampton Hall program where the groupings are more important than in the case of departmental organization. IEB, she said, was designated as a regional center to educate the deaf/blind population, those who have congenital rubella with manifestation of visual impairment, or who are blind, and various degrees of hearing impairment. Colamonico offered the opinion that JGB is more like Frampton Hall than is AARB, the latter being departmentalized. Then, with further reference

to group #5, she repeated her previous statement that it would not be appropriate for Clifford because "ADL is not stressed as much as in other groups during the day program ... (and) the group itself needs a quiet manageable group, and the students that have problems in, say, aggressive behavior or acting out behaviors, would be inappropriate for that group." (Tr 1824/11-13; 1825/5-8) Therefore a student who screams, as Clifford had been described, "would be disruptive to the grouping, to the students in the group, to maintain ... a manageable and quiet environment for them." (Tr 1825/9-18) In group #5 there are no screamers, and none who pulls hair, another practice that "would take time away from the other students, instructional time." (Tr 1826/9-20)

Golinker asked what makes Clifford so different from the Frampton Hall population. Colamonico's reply: "... (He's) a verbal student ... and the ... verbal students at Frampton Hall ... don't have acting out behaviors when demands are placed on them ..." (Tr 1835/23-24; 1836/3-9) The transcript thereafter reflects discussion about testimony by Daly,[19] Clifford's hair-pulling, behavior management at Frampton Hall, contact with previous programs of Clifford's, his testing of staff persons when demands are placed on him, staff distribution at Frampton Hall where 18 are employed, and the way in which the arriving buses are handled. On a bus that would deliver Clifford, she said, "(t)here is a bus driver, and generally with handicapped -- transporting handicapped population of people, generally a bus matron." (Tr 1848/3-7) The balance of testimony by Colamonico consisted of answers, briefly, to Barrett on redirect, and to Golinker on recross, the latter dealing with the mix in 1985-86 compared to 1984-85, as well as behavior management or modification at Frampton Hall.

PETITIONER'S CASE

Respondent having had the burden of proof in this hearing, the development of Petitioner's case began to take shape in the cross-examination of witnesses, particularly Guarino and

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[19]Daly had testified for Petitioner at a previous session. (See below.)

Colamonico. The first of Petitioner's witnesses testified November 6 when Agnes Reiss examined Dolores Schmitt, mobility instructor with the New York State Commission for the Blind and Visually Handicapped. After detailing her background and experience, she explained the nature of her work in assisting clients with their traveling, including clients who are multiply handicapped. She met Clifford Burr in October, 1984, after being requested to assist in finding a placement for him. The meeting took place in the Burr residence for about two hours, and Clifford "was able to say my name ... and he was able to tell me his name ... to tell me his age correctly and ... that he had a sister and what her name was." (Tr 1149/8-25) At this time Clifford was not self-abusive, nor did he attempt to hurt anyone, but he exhibited self-stimulatory behavior -- a "(r)ocking motion ... both sitting and standing up ... some finger flicking and taking ... a lid from a coffee can and flicking it ... toward the side of his face." (Tr 1150/4-17) Schmitt also observed that "(h)e verbalized to his mother he wanted a record put on. When she brought out one record and put it on, he indicated he didn't like that record and that it was a different record that he wanted." At lunch time "(h)e came to the table, and it was obvious he wanted to have lunch. And also, at one point, he stood up and started to walk towards the bathroom, and he was indicating his toileting needs at that point." (Tr 1151/2-14) When she prepared to leave, he said goodbye, shook hands, and correctly used her name.

Schmitt saw Clifford again in the same month, then again in February and October of 1985. Assessing his needs, Schmitt specified vision services, speech and language therapy, physical therapy with some indication he would also benefit from behavior management, as well as orientation and mobility training in the form of trailing a wall, sighted guide techniques, and general orientation and awareness to his surrounding. (Tr 1153-54) Schmitt is familiar with IEB and Frampton Hall, having interned at IEB February-June, 1977, (Tr 1138/2-10) and visited on other occasions. At Frampton Hall, she said, there is physical therapy, behavior modification, speech therapy, as well as the experience of 15 years in educating the multiply handicapped. (Tr 1155-1157) Also of importance, in

her opinion, is the fact that most of the Frampton Hall classrooms are located on the first floor, minimizing the need to use stairs and therefore increasing safety.

There was no cross-examination of Schmitt, and the next witness for Petitioner, called November 8, was Nivene Young, special education teacher for the New York City Board of Education doing inservice and consulting with classroom teachers. Her work includes vision training and orientation on mobility, the former involving the use of vision effectively and the latter the handling of doors, ascending and descending stairs, trailing walls, finding classrooms, and sitting appropriately in class. (Tr 1187) Responding to questions from Maureen Mahoney, Young said she also works on feeding which involves holding a plate with one hand and picking up food with the other. She is in the second year of activity in a Track IV program, and all of her students are blind or visually impaired. In addition, some are profoundly retarded and some have cerebral palsy. (Tr 1188-1191)

Young previously was employed at AABR as vision training therapist, and Clifford was one of 25 students she worked with there. She worked with him individually twice each week for 30 minutes for a period of one year, functioning as his "teacher for vision and orientation and mobility." (Tr 1194/21-22) This included activities previously described in terms of using stairs, trailing walls, finding classroom and sitting in a chair. Also, tactile discrimination, and auditory skills such as locating sounds. Young described experiences with Clifford, including use of bathroom, and told of his progress in the development of trailing skills. Her testimony disclosed that she had observed exploration to some extent, that necessary prompting ranged from physical to verbal, and that inappropriate behavior had consisted of excessive rocking and finger flicking. Clifford responded to verbal commands, such such as finding a classroom or reaching out for an object, and he screamed when excited or frustrated. Excitement and frustration seem to have caused a loss of control, and Clifford would then engage in aggressive behavior such as grabbing hair. "When demands were made on Clifford," she said, "and

... he didn't want to do it or had enough, was bored, he would either verbally tell you or reach out and tell you by inflicting pain by, perhaps, the hair." (Tr 1202/22-25; 1203/2) But he was not self-abusive, nor did he behave aggressively with other children.

Clifford, as described, has a palmar grasp, can hold a spoon and a cup, and sits by himself, upright, usually rocking at the same time. On the stairs, with more difficulty descending, Clifford's cerebral palsy causes the dragging of one leg, and physical prompting is needed. He is dependent in travel to unfamiliar places, but not in school or at home. His neurological involvement also seems to account for some difficulty in eating, scooping from bowl with spoon and then tending to flip the spoon before it reaches his mouth. Clifford has worked with a sighted guide, and in AABR he presented more problems upon returning from a vacation, apparently then more resistant to task performance. He could be left in a classroom alone, if necessary, sitting and rocking. With a lot of verbal praise and verbal prompts, and sometimes physical prompts, he would attend to a task for about 20 minutes after Young had been working with him -- 20 minutes each for vision training and for orientation and mobility.

Young has maintained contact with Clifford since she worked with him at AABR in 1983-84, including telephone calls and a summer camp visit in 1985. She also visited at the home of the Burrs a few days prior to her appearance as a witness in this hearing. During a four-hour period Clifford had recognized her, shaking her hand and saying her name, exhibiting excitement at seeing her, some of it by screaming.

IEB is familiar to Young because she had an internship there in 1982, but she did not work at Frampton Hall. Regarding IEB, with the examination of the witness having been passed to Heidi Minuskin, Young said that the Trott letter and MDT recommendation for Clifford had been read to her. So, too, the Frampton Hall Phase I IEPs, and she had taped these and listened to the tape later, as well as taking notes on her braille writer. Her familiarity with the situation at Frampton

Hall also results from her having attended numerous sessions of the hearing. Clifford's 24-month level of gross motor skills, she said, is similar to or in the range of the students in Frampton Hall. (Tr 1245-1257) Regarding related services, her opinion is that Clifford requires speech therapy, physical therapy, orientation and mobility training, and Frampton Hall already provides these services to its students. Moreover, she said, the goals for Clifford recommended by IEB are very similar to those which he had at AABR, and those goals are presently indicated for students in Frampton Hall.

Rosenberg's cross-examination, commencing November 8 and continuing on the 12th, questioned Young's qualifications, and he inquired about Clifford's experience in AABR in relation to other students. He rocked and screamed, but presented no threat to others and was not a distraction. Sometimes, but not always, a verbal correction would bring the screaming to a halt. Young's testimony also disclosed her belief that Clifford tested boundaries all the time "if you were new to him." (Tr 1290/18-20) This happened with her, and working with Clifford twice a week it took a month for her to establish boundaries. It was possible, she agreed, that Clifford would appear to be aggressive to someone meeting him for the first time. And she said his hair pulling "was only done in the testing situation." (Tr 1302/5-12) Counsel asked about Clifford's attention span for task performance, previously put at 20 minutes each for two in a row in the testimony of this witness. One example would be "going from the bathroom up the stairs to locate a classroom," (Tr 1338/13-18) and another is "the language task like having him have a conversation with you, and having him do something after that." (Tr 1340/9-11) But it would be for less than 20 minutes without verbal or physical prompting.

Concerning IEB's interview and evaluation of Clifford, when he was observed rocking and pulling his mother's hair, Young was asked how IEB would have known if he was being assertive or aggressive. The answer: "I guess they wouldn't know unless they really knew Clifford." (Tr 1346/10-16) His verbalizing, she said, includes the ability "to converse with you

about three sentences," and "(h)e can sing songs, if you ask him to sing songs ... He likes to sing, and he likes to talk. He knows his telephone number. If you ask him what his telephone number is, he will repeat all seven digits." (Tr 1348/21-25; 1349/2-3) Further questions largely were intended to impeach the credibility of the witness (Tr 1359/13-17), and Young informed counsel on redirect that she had been available at the end of 1984 to answer any questions about Clifford's placement in a new school, including IEB. (Tr 1389-1390)

On December 5 Catherine Daly became the last witness in the presentation of Petitioner's case. Examined by Edward Colligan, Daly is principal of Northside Center for Child Development, and she had been employed as assistant education director of AABR from 1979-84. She came to know Clifford Burr upon his referral following education at JGB. In conjunction with this change, Daly learned that busing had been a problem as the bus company serving JGB complained that Clifford "was not independent enough to come off the bus by himself." (Tr 1598/4-9) This led to his being transported in a wheelchair in a non-ambulatory bus. Another consideration was the fact that Clifford "was a screamer at the Jewish Guild for the Blind," and for this reason JGB's principal "did not feel -- any longer that she could contain him there, that he was a disruption to the other children and it was too time consuming for the staff." (Tr 1599/ 3-10) In addition to these problems at JGB, there would be the problem of stairs at AABR.

Daly visited JGB to get a better understanding of the problems there involving Clifford, and it was her sense that "they did feel, and legitimately, every school has a right to determine what is disruptive for them, and I think they felt they could no longer provide this child with the education he needed." (Tr 1602/10-15) But AABR was receptive to Clifford, having experienced screamers, many more severe, and his screaming was "a much more elated, happy kind of scream ... it had that element to it ... a playfulness." But it was annoying, Daly said, and "Clifford can be manipulative in terms of that." (Tr 1603/8-24) AABR staff was prepared for Clifford, and the program there was "very task oriented ... an interdepartmental

program ... self-help setting ... to a fine motor setting ... to a gross motor setting." (Tr 1604/6-10) Upon Clifford's arrival at AABR

> ... he was screaming when he came. He screamed for probably the first couple of weeks really a lot. But we ignored it, and we always focused him back to the task, to a hands on task, in terms of working. It was dramatic. And I'm not saying that because I'm speaking on behalf of that school. It was just a dramatic difference in terms of it did not get the attention that he needed to get, and as a result it diminished ... never completely, but ... greatly. And it escalated after vacation times, Monday often times and part of it was, in terms of the parent behavior and in the way they dealt with Clifford. It plugged into that screaming and it was a wonderful attention getter for him, and he really knew how to use it. And it was amazing. (Tr 1604/21-25; 1605/2-12)

Other behavioral characteristics of Clifford's, according to Daly, included rocking, and he would take his middle finger, right hand, and self-stimulate on the bridge of his nose. When he got excited, he would flip his hands, raised and pushing out, waving back and forth. And when he was very frustrated or almost in a temper, he would push his hand very hard against his head or he would press the bent index finger of his right hand to his teeth. These behaviors, Daly said, are common in some fashion. (Tr 1605-1606) Regarding communication, at AABR, Clifford's skills were very high in comparison to his motor skills, which were low because of cerebral palsy involvement. "He would really express needs for himself," she said. "... identify children ... talk about favorite things ... (with) an array of vocabulary that was unusual for the multiplicity in other areas." And apart from responses being part of a question fed back, Daly said "there was spontaneous language and initiated language on the part of Clifford." She judged his communicative skills to be high when compared to other profoundly retarded children. (Tr 1607-1608)

Prompting was at times significant to get Clifford started, as his manipulations were "to hold up, to be silent, to check you out, to test you all the time, until he got a sense that you could be tested and you were going to come around everytime in a consistent manner ... so there were times that an initial prompt, like, you know, if you asked him how he was, you might say 'I' to start him off, to let him know you were still with him and you were still expecting that. Then he would tell you, 'I am fine,' 'I am tired,' 'I am whatever,' he would say that in full sentences." This might involve five, six, or seven words in an extended sentence. (Tr 1609/2-24) Clifford was "very aware of what was going on around him ... of other children ... of the environment, and of people, staff that he liked ... (and) the ones that he didn't like too ... (he) noticed people missing ... (h)e liked music very much (with) a repertoire of songs that was amazing ... loved the xylophone ... often talked about it..." (Tr 1610-1611)

Clifford is "a very large boy, rather awkward of gait ... proportionately his hands are thick and maybe they're not as well exercised because his fine motor skills are poor." This required of staff "either totally physical prompting or intermittent physical prompting ... (i)n some cases it would be continuous verbal, but in most cases it would be intermittent physical ... a tap on the ... shoulder, to get him to move on a task if it was a large gross motor task." In relating professionally to Clifford, staff

> ... really had to work Clifford. He would tire, and it was a real effort. Fine motor skills and working through fine motor skills was a real effort. Gross motor skills were too, but the body was more in gross motion, so it was a little bit different in gross motor. But in fine motor, and that carried over to the self-help area in terms of self-help skills, beginnings of tasks in terms of zippering and large, large button skills, things like that, we're talking about he would be — he would tire, and he would tell you that. And he needed a lot of physical hands on. (Tr 1611-1612)

Clifford was more verbal than most students of AABR, Daly explained, as "(m)any of the multiply involved severe to profound children don't have that ability." (Tr 1613/3-17) Continuing her testimony under direct examination by Stephen Foreht, Daly said she didn't consider Clifford to have been a behavior problem "in terms of any severity of behavior," comparing him to other students, as "(h)is disposition was a real asset (and) (t)he fact that he talked and you could talk to him was a terrific asset ... real areas of strength ..." The greatest concerns were "the screeching that became controlled and maintained because of a stance that we took in dealing with him from the very beginning (and) his being able to navigate the stairs, and ... the holding issue that he was able to utilize." (Tr 1614/17-25; 1615; 1616/2-4)

His hair pulling was very infrequent, she said, and when admonished "he would actually be remorseful ... would feel badly ... either get a very sad expression, and sometimes he would begin to cry ... it would happen, but it was very infrequently." And she did not "recall of it every (sic) occurring with a child, with a peer. It did occur, when it occurred, with adults, with staff working with him." He didn't pull his own hair, but "(h)e would flip of his hair ... his hair was cut was down to his forehead ... so we felt it lent itself to some of the self-stim ... almost an aggravation, I would suspect." (Tr 1616/5-25; 1617/2-23) . Daly remembered no scratching by Clifford, nor was he violent. "Actually," she said, "he's got a very warm disposition ... basically he's a very happy-go-lucky kind of child," and regarding temper tantrums "(h)e would kind of get tense, get real kind of tense, and he would do this kind of pressing kind of thing ..." (illustrating with hand to head, finger to teeth). His behaviors were not unusual "in a severe and profound and multiply handicapped population," and Clifford's behavior also included crying spells. But his episodes of temper tantrums or crying spells did not affect his education or learning ability, neither being of such a degree to cause staff to consider him to be a severe behavior problem. (Tr 1618-1625)

Clifford's transportation to AABR was in an ambulatory bus, and "he was taught how to come off that bus and he was supported until he was able to do that ... He sat in the front seat and we would go on the bus ... having him get hold of that pull and stand up and step toward those steps. Position his hand on those steps and hold those hands and make him take those steps down until he gradually — that process became more his and less ours." And this was accomplished with the help of driver and matron of the bus company who "really cooperated." Clifford was picked up at about 7:20 a.m., Daly recalled, with children coming into the program at 9:15, and "(h)e liked riding. He enjoyed it. It was never indicated to be a problem. And they would sing. The matron would sing with him. He would have all the repertoire of song, so he would provide the songs and she would sing along with him." She described the grouping process at AABR, taking account of needs including fine motor skills, gross motor skills, and size and age, as well as language and socialization and learning rate and management needs. Daly testified about the implications of the onset of puberty among AABR's students, noting that JGB had questioned whether the intensity of Clifford's screaming was related to hormonal changes. (Tr 1626-1632)

Responding thereafter to Golinker, Daly said that Clifford had benefited from instruction at AABR with its highly structured environment, and he acquired skills. "In terms of stairs," she said, "he learned to get off that bus. Not totally independently, but very close to that in terms of positioning. You would still have to have hands on ... but you didn't have to get him up out of his seat, he could walk to door by himself and he could go down those stairs." (Tr 1633/15-24) She also described Clifford's experience with the building's stairs: " ... he could successfully go up the stairs by himself with somebody behind him. His wide base and his gait was awkward. He also has one foot that kind of precedes the other and it's in a turn kind of position, so it often offsets some of his balance as well ... The going up was not a problem. The coming down was a problem." In the classroom, Daly said, he had skills and improved them, but there were areas where more learning was possible at the time Clifford left AABR. To begin

with "there was not even any perception of a grasp ... (but) (t)here was progression (although) he needs a lot more training ... because it has not carried over into things like self-help skills (and) I don't think he's at the end of his road, no ... there is a lot of development that can happen ... He can learn, he learned, he can continue to learn." (Tr 1634-1638)

Rosenberg cross-examined Daly. To begin with, she said to him, she had no opinion about whether IEB should have accepted Clifford, never having seen its program. At JGB, she had understood, there had been very difficult problems with Clifford, and she agreed that some children may be appropriately educated in one setting but not another ... "that the very fact that a setting does not feel that they can appropriately ... serve, that's an area that needs to be respected ..." (Tr 1642/12-18) At AABR "our flexibility was greatest because it was an interdepartmental setting ... a child's needs could be programmed interdepartmentally ... you were not dependent upon a self-contained classroom to be the sole educating resource for that child." (Tr 1644/2-8) Referring to Clifford, the witness said that cerebral palsy had exacerbated the condition of blindness: "... the tactile senses ... had to be much more heightened ... to explore his world on a tactile sense, and that in terms of adaptation, in terms of materials, in terms of presentation, that was something that was very key, that was different than a child who was sighted." (Tr 1645/4-11) So, too, there would be a difference comparing Clifford to a child who was blind but not a victim of cerebral palsy, affecting the ratio of professional to student.

At JGB, where Clifford had been for five years, "according to them, the indication was that (Clifford's) behavior ... had changed, that when he first came to them, they did not have screeching behavior, that they did not have the problems on the bussing. That this was something that had occurred more recently and something that they felt they could no longer tolerate and provide the staff to do the ... kind of handling that this demanded. And they did attribute it to adolescence." (Tr 1646/13-23) Regarding the needs of the deaf/blind rubella population compared to Clifford, Daly agreed that "(t)hey at

times can be different, but it depends on your program." (Tr 1651/3-6) She also agreed that all multiply handicapped children do not have the same needs, that some needs will be similar and others different. Clifford's screaming and hair pulling at AABR, Daly maintained, was not considered to be "severe behavior ... not ... socially inappropriate because it was not that consistent." (Tr 1653/9-20; 1654/3-4) JGB, on the other hand, "determined that that was the limitation of their program and they could no longer serve this child. And they have a right to do this." (Tr 1655/25; 1656/204) Turning to the busing of Clifford to JGB, Daly said that "the bus drivers can really rule the roost in some ways and they can say ... 'We're not going to pick that child up,' or 'We're not going to assist that child,' and as a result of that ... there are more children than somebody like a Clifford Burr that are on non-ambulatory buses." (Tr 1657/15-22)

In Clifford's AABR class three students were visually impaired, the ages ranged up to 17, all were multiply handicapped, most severe, and three were verbal — four including Clifford out of twelve. He was the only one who screamed or cried except for moments of crying by others. It was not a self-contained class, but Clifford moved to different settings. He spent 1-1/2 - 2 hours in homeroom, and without departmentalization the programming would have been different in that an effort would be made to "minimize behavior differences (and) avoid putting behaviors that would trigger off other behaviors in other children." (Tr 1658-1662/6-11) But, she said, "I don't think you would try to provide a fail safe environment where the child would never cry." In any event, she added, "I did not consider, nor did anybody at AABR consider Clifford a crier. Clifford was a screamer and only a screamer when he came to us." (Tr 1663/2-12) Yes, screaming would be significant in programming, "And that's why before he ever got his foot in the door we were prepared for that screaming behavior. It was absolutely significant. It could trigger off in other children." (Tr 1663/13-18)

Hypothetically, Rosenberg asked a question, which I paraphrased after an objection not sustained, to the effect of

whether, upon consideration of clinical data in a clinical setting, it would be appropriate for the evaluators to make some decision with respect to acceptance and placement, taking account of this screaming condition. The answer:

> Yes, absolutely. I did that. That's what led me to go to the Jewish Guild for the Blind to see what was actually happening. Because as I sensed the screaming and the quality of that screaming as an intake professional with the team, that there was something that was not jiving with the fact that this was such a severe behavior. It seemed manipulative. It seemed controlling. It seemed like something that could be addressed. And that raised our concern in terms of seeing this in the context were there other issues that were not clear in the intake, that were in addition to the bussing. We just had questions about the fact that screeching was the behavior that they were pointing to, by the quality of the presentations of the child himself in doing the intake. (Tr 1667/2-25; 1668/2-4)

Daly's perceptions, she admitted, could have been different had she not had the opportunity to visit with Clifford at the Guild, and that she had greater understanding because of that visit. And she agreed that some children might be more appropriate in an intact setting than in a departmentalized setting because of the needs of the child. (Tr 1169-1170) But she didn't attribute part of AABR's success with Clifford to the flexibility of departmentalization, adding that "you have to understand about a departmental setting (that) children are not all day on the move. They have to sit in a setting and work for 45 minutes. And it doesn't mean that the child ... screams on the move and doesn't scream in the context of a setting." (Tr 1671/2-7, 16; 1672/5-10) Upon Clifford's intake to AABR his behavior changed significantly in three weeks. (Tr 1675/19-24)

Further cross-examination concerned developments, including Daly's involvement, regarding Clifford's placement

after the closing of his program at AABR in June, 1984.[20] Daly visited PS 396 "and they were right up front in terms that they did not know what to do ... we had a number of visually impaired and blind multiply handicapped children going into that setting and they didn't have a clue, there was nothing in place, and they didn't have a clue what they were going to, but the sky was going to be the limit in September." (Tr 1691/8-15) Counsel then referred to the COH file on Clifford (REx 2) and noted that the report of a speech pathologist in April, 1984, showed Clifford to have a speech capability of producing 4-5 words. Daly did not challenge that finding, merely observing that the examiner was "not talking about the total environment of the school setting ... (and that) "(i)f Clifford is talking in sentences about what he's touching and that is a pair of pants, that's one thing. If Clifford is talking about the social environment of his home, about his favorite songs, about the story that his sister has read to him, that's a different context. And his language vocabulary is more extensive." (Tr 1696/18-20; 1697/6-13)

For Clifford, to follow the closing of AABR, Daly said that Clifford should be in a "totally environmental setting that treated him as a child who is blind, multiply handicapped, severely retarded. As a total child." (Tr 1701/12-14) In regard to the nature of his handicapping condition, she made these comments:

> I have never really said or had the nerve to say ... that the blindness was primary and the retardation was secondary, or the retardation was primary and the blindness was secondary. I would never dare to say that. Those are two terribly (sic) severe handicapping conditions that you cannot separate because the entry of that child because he's blind, whether he's retarded or not, is through development of his hands. It's through tactile approach to the life

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[20] Responding to objection regarding relevancy, I observed that "counsel for both sides need to be concerned about developing a record ... for consideration by the commissioner ..."(Tr 1685/19-20; 1686/2)

> around him. It's through the acuity that has to be developed.
>
> We do him a disservice if we try and split and make him retarded or make him blind. You do him a disservice. You know that at the Institute. You've worked with these children. You know that it's a disservice to any child, to separate him into compartments. He is a whole child, and if we fail to treat him that way, we have failed education. (Tr 1704/9-25; 1705/203)

Rosenberg, persisting, asked whether it is possible that, notwithstanding written reports of a child,"that clinical testing can result in a perception of his difficulties that may be different ... that for that given period of time the orthopedic impairment may be greater than the visual impairment or vice versa." Daly agreed, noting that "a lot depends on whether is a child familiar with you? Is he not? Is he anxious about being with you? How long is he with you? How can he respond? Those are all very essential key, key questions in terms of screening a multiply impaired child." (Tr 1706/12-25; 1707/2)

Daly was asked also about her presumption of how Clifford might have been expected to act during his evaluation at IEB in November, 1984, after having been out of school since June, Rosenberg recalling previous testimony that Clifford had behaved differently at AABR after a vacation or a weekend away. Daly then remarked on "things ... in the environment of the home that Clifford learned (that) (h)e never learned ... in the school ... Clifford is not going to come back functioning exactly on the level of where he left ..." (Tr 1708/6-10; 1710/13-25; 1711/5-7) The cross-examination was then concluded with further reference to Clifford's crying ("There was no excessive crying."), gesticulation with the hands ("That occurred most frequently."), flicking of the hair ("Yes, there was presence of that."), and hair pulling of adult faculty members ("No, that was a very infrequent thing.") (Tr 1713-1715) And Daly finished up by saying that IEB had never

communicated with her in conjunction with its consideration of Clifford's application for admission. (Tr 1715/15-19)

SUMMATIONS

Petitioner's Summation by Golinker (Tr 1860-1878)

The questions to be answered first are whether IEB has students with Clifford's characteristics, and does IEB provide any students with an educational program described as needed for Clifford. Other considerations asserted in the proceeding are not relevant: IEB's admissions criteria, space and physical plans for Frampton Hall, budget for IEB, other 4201 schools, other private placements, Grow With Us, etc. Many of them, counsel pointed out, were not in existence at the time IEB made its decision about Clifford's admission. For example, one set of admissions criteria (REx 23) had not been adopted, and the same is true with respect to IEB's budget for 1985-86. Some of the reasons alleged by Respondent for the negative recommendation were available to IEB at the time, but they were not stated in its letter of recommendation, (REx 3) as required by Commissioner's Regulations.

Respondent bore the burden of negative proof in trying to show that IEB cannot educate Clifford in an appropriate setting. It was necessary to establish that its students were so dissimilar to Clifford, or its staff expertise and experience so lacking, that there could be no appropriate setting for Clifford at IEB. In this regard, important evidence is the characteristics of Frampton Hall's student population as indicated in PEx 16-19. The record also contains a great deal about Clifford, and it is the comparison of characteristics that is critical, making the comparison at the school level. Respondent may want to raise the admissions criteria as an affirmative defense, but the criteria were not set forth in IEB's recommendation as a reason for rejection.

Petitioner asks for compensatory education for a period of two years, on the basis of an equitable standard, because of what has occurred here. The principal purpose of compensatory

education is to restore the status quo, and here that would mean putting IEB and Clifford Burr back in the positions they would have occupied had IEB's decision been in favor of Clifford. The standard of proof in regard to compensatory is a strict liability standard, and harm to Clifford is a relevant consideration.

Respondent's Summation by Barrett and Rosenberg (Tr 1878-1891)

Counsel said that an understanding of the 4201 system within the State of New York is essential to a resolution of the issue to be decided in this appeal, particularly the role of a publicly supported, but privately managed, institute such as IEB. And she referred to the Institute as a whole, not just Frampton Hall. Such a school as IEB has the right to change its program and to develop reasonable admissions standards which are uniformly applied without discrimination. That is the case here, it is argued, with no claim of discrimination against Clifford Burr, and apart from this consideration IEB has independently established the reasonableness of its conclusion that Frampton Hall would be inappropriate as a program for educating Clifford. This is borne out by the Frampton Hall records and other records, as well as by the testimony of witnesses, both as to Clifford's characteristics and as to the Frampton Hall program.

Summarizing, Clifford needs to be grouped with other verbal children. In light of the very small number of verbal children in Frampton Hall, essentially established for the deaf/blind, IEB is unable to accommodate Clifford's unique grouping of handicaps within a group at Frampton. As the program there is one of self-contained classes, this would add to the burden of organizing a program for Clifford. This program serves mainly a residential population, and the need to transport Clifford at least an hour and a half each day, each way, leads to the conclusion that IEB cannot be the least restrictive environment in which to educate Clifford. And the primary obligation to find an appropriate placement rests not with IEB, but with the COH and other public bodies.

I am told by counsel that I should not consider the decision rendered in the appeal by the Burrs from the COH recommendation of placement in SIE II (formerly Track IV) at PS 396 as it remains to be seen what bearing the decision may have on Clifford's placement.

Referring to Daly's testimony, counsel submits that it is important that she, as a witness for Petitioner, understood the need to respect a school's philosophy in terms of what type of child it can educate, and that should be given great weight. Petitioner essentially would have IEB become a scapegoat for the fact that Clifford has had the experience he has had at the hands of the educational system since the AABR program decided to close. It is the obligation of the COH and the public school system to find Clifford an appropriate placement, and if none exists in the public schools, to find one in the private setting. The 4201 system is an independent system which is a layer on top of this requirement, but was never intended in its legislative history to be the primary response to the Federal legislation which implemented the rights of the handicapped.

It might have been better, counsel submitted, had IEB's notice to the Burrs been prepared for litigation, explicit in every detail, but that was not the intent. Rather, it was intended to advise the parents if IEB felt it was an appropriate place for Clifford, and it is clear that they said it was not. The Burrs had been informed that IEB had not admitted any students similar to Clifford during the previous three years. Although Burr and Daly express understanding and respect for the decision of JGB to discharge Clifford when he was no longer appropriate for the program, they criticize IEB for declining to accept Clifford for the same reason, namely, inappropriate placement. A major consideration in this regard is how many Frampton Hall students are verbal and how many of these present management problems. There are four verbal students grouped together in Frampton Hall.

JGB had a tremendous amount of difficulty with Clifford. Why else would they want to increase his prescription as they

did? Why else was he restrained on the bus? For four years he was appropriate; in the fifth year this changed. JGB differs greatly from AABR, as Daly said, but it is JGB that is much more like Frampton Hall. What IEB had to go on, therefore, was a history of Clifford's having been asked to leave a program similar to their own in Frampton Hall.

The situation here is one where IEB had for consideration, after accepting no one to Frampton Hall for three years, a student who appears to have been a serious behavior problem at his school, who had been asked to leave, and who attempted an act of physical aggression on his own mother. That was something for IEB to go on to make their decision reasonable.

With respect to compensatory education, it is important to note the statutory requirement that the local educational agency, through its COH, must make a recommendation as to classification and as to placement. A parent under those circumstances has the right to enforce the status quo provision. But in Clifford's application to IEB, due to no fault of IEB's, the opportunity of status quo was removed. The Burrs had the choice of placing Clifford in PS 396, but they chose not to place him in school at all. IEB is not responsible for the decision to keep Clifford at home, and nothing in the statutes or regulations says that, upon declining to accept a child, IEB becomes the status quo placement. IEB is obligated only to evaluate and to allow that evaluation to be questioned;there is no obligation during such questioning, as in this hearing, to provide any service, and there has been nothing in the record to show ill will, nothing deliberate which would be the basis for compensatory education.

In summary, when we look at Frampton Hall as a program, we find that a lot of seriously handicapped kids are similar, but there wasn't anything to be offered to Clifford because IEB had an obligation to the children already being educated, an obligation taken seriously in not discharging any students even though they would not fit under the admissions criteria. A point is made about Clifford's being verbal, but the issue of behavior management was important in the decision of IEB. As a

behavior management problem, Clifford would have had an adverse impact on the other children in the class. As much as all are concerned about his education, IEB must also be concerned about the education of the other children Clifford would have to be educated with, and his placement in Frampton Hall should not be at the expense of anybody else previously placed there.

ANALYSIS AND CONCLUSIONS

Was it reasonable for the MDT at IEB, based on evaluation of Clifford Burr, to recommend that "he not be appointed to our program," quoting from the letter of 2 January 1985 sent by Trott to the Burrs? The starting point for analysis looking to an answer to this question is properly said letter and supporting material attached thereto. (REx 3 and PEx 5) The letter itself is not revealing, but Trott enclosed "the evaluation reports utilized in coming to this decision." The reports are two in number: educational and psychoeducational, both covering evaluations performed 26 November 1984.

The report of educational evaluation, conducted by Linda Gerra, shows Clifford to have been 17 years of age at the time, his birth date being 12/30/67, and he is described as a "multi-handicapped blind adolescent whose physical size is appropriate for his age." The Development Assessment Screening Inventory was the only instrument used formally in the evaluation, but items were also "taken from development scales, such as the Bayley" in addition to informal assessment and observation. The process resulted in findings reported under the headings of: perceptual-motor, fine-motor, gross-motor, language and communication, ADL, cognitive and social/emotional. Under the heading of "Results" one learns that "Clifford is functioning between a 16-22 month old level, (but) since he displayed some functional language skills, this area is highest at almost 36 months." Gerra also notes that "(i)n the area of gross-motor he is functioning at approximately a 22-month level (and) (i)n the area of fine-motor ... at 16-18-month level." Under "Social/Emotional" the report discloses Clifford's acceptance of necessary physical guidance and an attitude that was "quite cooperative." Regarding maladaptive behaviors,

Gerra wrote that "(t)he only evidence ... was towards the end of a long session (when) he scratched me (and) (a)s we were concluding discussions with Clifford's parents, Clifford pulled his mother's hair." Five recommendations followed.

Trott signed the psychoeducation evaluation report, which more specifically put Clifford's age at 16 years and 11 months. This report sets forth an educational classification as "Multiply Handicapped with 'total blindness' " and "Other Disabilities" consisting of "Mental Retardation" and "Cerebral Palsy - right hemiparesis." Previous test results are indicated as of 3-25-83, and Trott's assessment employed the Development Profile II, Merrill Palmer Scales and Bayley Scales of Infant Development. Developmental Skill Age Scores were said to be: Physical - 1.8; Self-Help - 2.2; Social - 2.2; Academic - 1.6; and Communication - 3 with an I.Q. Equivalency Score of Severe-Profound Mental Retardation. Trott reviewed background information, noting that "Clifford is taking Haldol ... to reduce his hyperactivity (and) (h)is participation in instruction has focused on gaining independence in eating, toileting, and dressing. Past evaluations have revealed that Clifford experiences profound mental retardation related to both his intellectual skills and adaptive behaviors."

In his summary of the psychoeducational evaluation, Trott wrote that "Clifford Burr is a multihandicapped youngster whose primary handicap is mental retardation ... (and that) (i)t can be expected that Clifford may not develop independence and will need guidance and assistance throughout his life." The report has seven recommendations, and it includes details with respect to "Test Behavior and Communications Observations," as well as results from the Merrill Palmer Scales, the Bayley Scales, and the Developmental Profile II. An MDT "Summary Sheet" is included separately to show, under the heading of "Educational Testing," the following:

> Clifford is functioning overall at a 16-22 month age level. He does not explore objects or his environment, and his mannerisms interfere with his learning. He requires physical prompting to respond

> to tasks. He demonstrated an unrefined pincer-grasp (12-16 months), and practices gross motor skills at a developmental age of 24 months. Although he expressed a need to go to the bathroom, he required physical prompts to complete all activities of daily living. His most developed skills are in the area of communication where he achieves a developmental age score of 32-36 months. Self-stimulatory behavior constantly interfered with performance.

Under "Achievement Levels" the MDT sets forth estimated developmental ages in months for several developmental areas as follows: Language - 36; Intellectual - 24; Educational - 20, Personal/Social - 26; Self-Help - 26; Fine Motor - 20; and Gross Motor - 24. The "Suggested Educational Placement" is "Class for the mentally retarded," and there are six "Suggested Educational Goals":

1) Develop readiness and attention skills i.e., sitting still, listening, etc.

2) Develop skill in performing activities for daily living i.e., feeding, toileting, etc.

3) Develop pincer grasp for fine motor manipulation.

4) Improve gait ambulation for increased mobility.

5) Participate in behavior management therapy to increase practice of appropriate behavior and decrease inappropriate behavior.

6) Develop expressive, receptive language skills.

The "Suggested Related Services" coming from the MDG include "Orientation & Mobility Services on a consulting basis," and 40 minute sessions two or three times a week in several areas as indicated: Speech Therapy - 2; Occupational Therapy - 3; Physical Therapy - 2; Adaptive Physical Education - 3; and Behavior Management Therapy - 2.

In addition to communicating the results of evaluation and recommendation to the Burrs, Trott wrote on the same date, 2 January 1985, in his capacity as Chairperson of the MDT, to Dr. Rebecca Cort, Acting Supervisor, SED, a two-page letter enclosing the summary sheet sent to the Burrs. In this letter, a copy of which does not appear to have been marked for the attention of anyone other than the addressee, Trott repeated the assertion that Clifford has "a primary handicap of mental retardation." Trott wrote that "(a)s a result of this finding, it is recommended he participate in a program of habilitation for the mentally retarded," adding that "Clifford would not benefit from an educational program for the blind, and, therefore, educational placement at the New York Institute for the Education of the Blind is not recommended." The letter reviews findings from the MDT's evaluation of Clifford, based on the educational by Gerra and the psychoeducational by Trott, and concludes that: "He does not have academic potential and would not benefit from enrollment in an educational program for the blind. He is not recommended for enrollment at the New York Institute for the Education of the Blind."

It is appropriate, in the first instance, to consider the foregoing in light of applicable statutory and regulatory provisions. Education Law #4206, as noted above under "Relevant Statutory Provisions," specifies that "All blind persons of suitable age and capacity ... shall be eligible for appointment as state pupils to the Institute for the Education of the Blind in the city of New York ..." Section 4209 provides that "All children ... both blind and cerebral palsied shall be admitted ... under the same conditions of eligibility as are provided for the admission of ... blind state pupils." Turning to Regulations of the Commissioner of Education, it is pertinent to note procedure involving parental application to the Commissioner, referral to a State-operated or State-supported school for evaluation, and notification to both parents and Commissioner of the results of evaluation. The school is required to "recommend appointment if possible," (i.e., admission pursuant to appointment by the Commissioner), and

> In the case of a child not recommended for appointment to a particular ... school, the school shall notify the parent. Such notification shall be comparable to that required by section 200.5(a) of this Part, *shall include all reasons for lack of acceptance of the child into the program ... and shall include suggestions for more appropriate placement or program.* (Emphasis supplied.) (#200.7(d)

Referring to #200.5(a), attention is drawn to subsection "(4) (ii)" which calls for notice to the parent that shall "describe in detail the recommendation ... (and) specify the test or reports upon which the recommendation is based ..." IEB's notification to the parents of Clifford Burr, although it specifies the tests upon which the negative recommendation is based, and there is reference to information provided by the parents and previous test results, does not begin to "describe in detail the recommendation." To the contrary, Trott's letter of 2 January 1985 says that:

> Based upon the evaluation we at the New York Institute for the Education of the Blind have conducted, the Multidisciplinary Team has recommended that your child not be appointed to our program. The results of testing indicate that such a placement would not be educationally appropriate for your child for the following reasons: see attached letters and documents
>
> Enclosed you will find a summary of our recommendations for Clifford. This suggests the type of services and program we feel would be appropriate for your child at this time ...

It is not clear that this Trott letter, marked as "Referral Status Notification," had attachments for the Burrs other than the two reports of evaluations and the Summary Sheet. His letter and these attachments, as well as his letter to Cort, were introduced into evidence as REx 3 and as PEx 5, the latter consisting of everything in REx 3 as well as a cover letter from Trott to Craig

Curry, Administrative Coordinator, Central Based Support Team, New York City Board of Education, written 7 January 1985 simply to transmit enclosures.

Did the Burrs receive a copy of the letter of January 2 from Trott to Cort?* If not, the notification to the Burrs of IEB's recommendation, as formulated by the MDT, is conspicuously wanting in light of #200.7(d) insofar as it contains no reference to the finding of "a primary handicap of mental retardation" as the reason to recomend "a program of habilitation," rather than "an educational program for the blind" from which he "would not benefit" because he "does not have academic potential." (Quoting from Trott-to-Cort.) The Summary Sheet received by the Burrs does include "Suggested Educational Placement: Class for the mentally retarded," as previously noted, and there are "Suggested Educational Goals" reflecting recommendations in the evaluation report. But this falls short of the requirement to "describe in detail the recomendation ... " This occurs only in the Trott letter to Cort.

Were the Trott-to-Cort letter to have been sent to the Burrs, arguably they were thereby more fully informed in keeping with what is called for under the Regulations. Even without factoring this letter into the equation, I would be reluctant to make an issue out of the requirement that IEB must have included in its notification "suggestions for more appropriate placement or program." That seems to be satisfactory, but not necessarily so when it comes to the first requirement that the notification "shall include all reasons for lack of acceptance." At least not in terms of what Respondent sought to establish in the presentation of its case. The Trott letters, to the Burrs and to Cort, considered together with attachments, disclose that the reasons for lack of acceptance into a program at IEB are that Clifford, although "a multiply handicapped student, functions with a primary handicap of mental retardation ... does not have academic potential," and therefore "would not benefit from

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* Its receipt had been presumed in previous reference to said letter — see page A-48.

enrollment in an educational program for the blind." (Again quoting Trott-to-Cort.)

There are three parts to this summary of "all reasons": (1) primary mental retardation and (2) no academic potential, which are similar in effect, and (3) educational program for the blind. One might surmise, merely from a reading of these reasons, that IEB serves only students who are primarily blind and have academic potential. This hearing's transcript of proceedings, however, shows that this is not quite the case. As indicated in my review of the presentations of the parties, IEB's educational programs include one called "Frampton Hall." Located in a building with the same name, the program's students were 39 multiply handicapped boys and girls (21 years old or younger) in 1984-85, and the number is 34 in the current school year of 1985-86. Although the largest number of these students is classified as deaf/blind, the program includes those who are mentally retarded to a profound degree, thereby causing one at least to question the presence of academic potential. This situation in Frampton Hall, a program mentioned not once in the recommendation material sent to Burr and to Cort, necessarily leads to consideration of the characteristics of Clifford Burr, attributable to his handicapping conditions, compared to the characteristics of Frampton Hall's handicapped student population.

Before addressing the matter of this comparison, it is timely to take account of "reasons" advanced by Respondent in the hearing other than those set forth in the notification of lack of acceptance. Petitioner recounted these, in Golinker's summation, and argued against their relevance. Respondent, on the other hand, sought to counter when Rosenberg remarked in summation that it might have been better had IEB's notification of non-acceptance been explicit in every detail in preparation for litigation. Be that as it may, said notification contains no reference whatsoever to: IEB's future plans, budget, and admissions policy and criteria; physical facilities and use of space in Frampton Hall; bus travel time from the Burr residence to IEB; other 4201 schools or private placements; and the recommendation of the COH that Clifford be placed in the then-Track

IV program at PS 396. May omission be overlooked and these "reasons" be taken into account in deciding this appeal? I tend to doubt that very much, else to make light of an important procedural requirement, namely, written notification to the parent of all the reasons for non-acceptance. This is essential so that the parent will be fully informed in deciding whether to undertake statutory due process by means of impartial hearing to challenge the reasonableness of a recommendation against appointment.

IEB had ample opportunity to "include all reasons," and I must limit my consideration to the reasons that were set forth in the MDT notification of non-acceptance. This is not merely a matter of IEB's having failed to dot the "i's" and cross the "t's." With respect to Burr v. Institute, if there were other reasons, it was essential for IEB to have set them forth in writing at the time of its recommendation for Clifford. Having failed to do so, they may not receive consideration at a later date, in this hearing, of additional reasons. Indeed, the COH recommendation to place Clifford in 396/IV was not forthcoming until subsequent to when IEB's MDT had made its recommendation.[21] Similarly, only after the MDT/IEB recommendation for Clifford did IEB's Board of Managers adopt the "Admissions Criteria" in which there is reference to "the enrollment of students with a potential for academic achievement." (REx 23)[22]

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[21] The COH had recommended Track IV at PS 396 in 1984, withdrawn the recommendation before the referral of the Burrs to IEB, and then made it again 2/19/85.

[22] The quoted words lend nicely to comparison with Trott's writing to Cort that Clifford "does not have academic potential ..." Note also the "Strategic Planning Report/Executive Summary" sent to "All Parents and Staff" with the memo from Robert L. Guarino, dated 7 March 1985, in which summary the section on "New Programs" provides that: *"In addition to maintaining and expanding programs for current students who are* blind, deaf-blind and *multihandicapped blind*, the Institute will also begin new programs for children with other handicapping conditions." (PEx 25 - emphasis supplied.)

As early as the second session of this hearing, 2 May 1985, I took the position that "I need not — indeed, should not — pass on the reasonableness of any COH action regarding placement and program for Clifford Burr ... my task is to make a judgment about the action of the IEB, namely, whether reasonable or not in its conclusion that placement of Clifford at the Institute would be inappropriate." (Tr 9/6-19) At the same time I indicated that I would consider evidence about "least restrictive environment" with respect to Clifford. Further into my opening statement on this occasion, I said that "I am not interested in COH action on placement and program ... (but) I am receptive to any offering of evidence, oral or written, that will give me fuller understanding of Clifford's condition and the Frampton Hall program of IEB together with its 39 ... students." (Tr 11/4-13) I adhered to this position throughout the hearing, reiterating verbally and in writing as the transcript will disclose. The fact that, apart from other "non-issues," the record is so full of reference to COH/396/IV is attributable to my interest in evaluative evidence and, to some extent, consideration of least restrictive environment, as well as too much forbearance on my part.[23]

In a post-hearing memorandum, dated 10 January 1986, Respondent contends that "Other collateral issues have arisen in this proceeding," including COH/396, which "impact either directly or indirectly on the fact that based upon a personal evaluation of Clifford, as well as the opportunity to review his

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[23] It is readily apparent in retrospect that the hearing could have, and should have, been curtailed. With or without timely objection by Petitioner's counsel, I should have restricted Respondent in regard to issues. Limiting testimony about COH/396/IV in itself would have saved a lot of time. (As it is, a separate impartial hearing determined under date of 6 December 1985 that placement of Clifford Burr in P.S. 396 "is inappropriate" - REx 25.) By the same token, Golinker need not have been allowed to cross-examine Guarino for several days about facts both better known to Colamonico and set forth in Petitioner's Exhibits 16, 17 and 18. Some time was also consumed unnecessarily by the reluctance of Petitioner and Respondent to provide COH evaluation and Frampton Hall IEPs, respectively, and delay by Respondent in providing additional data belatedly requested by Petitioner.

educational history and his needs, the Institute determined that it did not have a placement for Clifford." (RMem 1)[24] It is difficult to discern how developments subsequent to the recommendation at issue could have had an impact of any kind. The other suggested collateral issues — status quo placement, least restrictive environment and compensatory education — invite discussion in due course.

This memorandum, prepared by Barrett and Rosenberg, provides an informative review of the statutory framework of 4201 schools, the history of IEB, and the development of the Frampton Hall program. The latter, counsel notes with reference to transcript and exhibits, "is being phased out (and) the School has not admitted any new students to Frampton Hall in the last three years." (RMem 9) This is of interest, but no more so than any other information not relevant to the issues to be resolved and the decision to be made in this hearing.[25]

Turning now to consideration of Clifford's characteristics compared to those of Frampton Hall's students, and the staff/program capabilities in this part of IEB, it is important to note that Petitioner does not quarrel with the definition of Clifford that emerged from MDT's evaluation. Rather, the issue was joined only because of MDT's conclusion that its findings warranted Clifford's rejection as a candidate for admission to IEB. Previously in this decision one has been able to gain insight and understanding about all the pertinent characteristics of this (now) 18-year old, multiply handicapped youth who is

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[24] Post-hearing memoranda, by previous arrangement, were submitted on behalf of both parties at the same time. Reference to Respondent's is designated "RMem" and Petitioner's "PMem."

[25] One can sympathize with IEB in the undertaking to reform programs to be more in keeping with its historical mission that dates to 1831. But that would appear to require more than unilateral decision-making as long as IEB continues to be a State-supported school under Ed. Law #4201. Otherwise IEB might have been expected to assert such a policy change as one of the "reasons" for rejecting Clifford Burr, if not to have attempted in the first instance to forestall the referral of Clifford as well as numerous others who were referred but not accepted 9/83-1/85. (REx 9)

blind and profoundly mentally retarded with further physical impairment because of cerebral palsy.[26] Admittedly, he has no academic potential.

The reasons advanced by the MDT for Clifford's rejection, it will be recalled, include the contention that he "does not have academic potential." But what is the situation in this regard among the students presently in Frampton Hall? Trott said "Yes" when asked: "Do you have any profoundly mentally retarded youngsters presently enrolled in IEB who you would consider do not have academic potential." (Tr 110/4-8) And Barowsky, one of Respondent's witnesses, said that he had not observed any academic instruction being given there. (Tr 388/9-11) This situation was noted by SED observers as indicated in the "Special Education Program Review" report, dated 30 April 1985, in the section on "The Multihandicapped Program at Frampton Hall." It is there reported that "(t)he primary focus of the majority of classes was on pre-academic activities and Activities of Daily Living (ADL)." (PEx 12)

The record is replete with detailed information about the make-up of the Frampton Hall student body, including particularly the testimony of Colamonico, as well as the Individual Education Plans (IEPs) and Psychoeducational Evaluations. (PEx 16, 17 and 18) Colamonico, responsible for the educational supervision of Frampton Hall, was forthcoming in this regard during cross-examination upon her recall December 4. Golinker inquired of her about no fewer

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[26] To characterize Clifford as "blind and profoundly mentally retarded" or vice versa is to indicate only that he is multiply handicapped without inferring that either handicapping condition is primary. Contrary to Trott's assertion in this regard, (REx 3 and PEx 5) Respondent's witness, Silberman, said "Yes" when I asked: "Profoundly mentally retarded, and blind is the same as blind and profoundly mentally retarded; is that correct? They are one in (sic) the same. It's just a matter of semantics." (Tr 245/19-23) And so, in effect, said Daly, testifying for Petitioner: " ... I have never really said ... that the blindness was primary and the retardation was secondary ... Those are two terrificly (sic) severe handicapping conditions that you cannot separate ..." (Tr 1704/9-16 and PMem 9)

than 24 characteristics related to Clifford's handicapping conditions, and all of them are to be found among the students in Frampton Hall.[27] She said that IEB has "the ability to educate the students that are in Frampton Hall." Moreover, with respect to staff expertise in providing a program for Clifford in Frampton Hall, she said:

> Presently, after going through the groupings and all, no, but as far as what you said, going through every single category, my staff is able to do that. (Tr 1554/9-10; 1555/22-25)

The "no" in this response of Colamonico's pertains to current class groupings in Frampton Hall. But may it be presumed that the situation in 1985-86 in the grouping of students shall be determinative of an issue that arose in the fall of 1984 when IEB's MDT evaluated Clifford Burr? I think not — no more than any other development subsequent to the evaluation on 26 November 1984, e.g., the Admissions Criteria adopted officially in February, 1985. This controversy must be resolved as if normal procedure had ensued with a decision rendered no later than the prescribed deadline of 45 days after inception of appeal, i.e., on the basis of the circumstances that obtained on the date of the recommendation for non-acceptance.[28] Protraction of proceedings, for whatever reason, cannot be allowed to open the door for consideration of reasons for rejection other than those set forth in the notification of the action taken by IEB on the referral of Clifford Burr.

The essentials that emerge from analysis of the evidence, as discussed in the foregoing pages of this decision, indicate convincingly that Clifford's characteristics, reflecting his handicapping conditions, were similar to those of Frampton

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[27] See listing, supra.

[28] SED's letter confirming my appointment to service as impartial hearing officer for this appeal notes that the request for appeal was received by SED 28 December 1984, and that decision was called for no later than 11 February 1985. (Said request, incidentally, preceded IEB's notification to the parents.)

Hall's students in November, 1984 (as well as at the present time for that matter), and Frampton Hall's staff had (and has) the necessary background, experience and expertise to develop a program for his education there. But the grouping, it is insisted, does not lend to his placement because of IEB's responsibility to students already enrolled in the program. Why not? The salient characteristics are common to the individual and to members of the group, including distractible and interfering behaviors. That must be the applicable standard of measurement, not whether the prospective newcomer would fit nicely into an existing class. Students have been reassigned from one class to another during the school year, and regrouping is decided upon each year at Frampton Hall to enhance the effectiveness of its educational program. That is as it should be, but not in any sense to create a barrier to admission otherwise unobjectionable.

I have addressed two of the reasons set forth to justify Clifford's exclusion from Frampton Hall: "primary handicap of mental retardation" and "does not have academic potential." It was also asserted that he "would not benefit from enrollment in an educational program for the blind." The latter reason might be persuasive were Clifford to have been considered only for acceptance to an IEB program other than Frampton Hall. Elsewhere in IEB there may be educational programs for students whose handicapping conditions are limited to blindness, or impaired vision, but that is clearly not the situation in Frampton Hall where the student body includes young people afflicted by profound mental retardation. Clifford Burr is blind, hence the referral by SED to IEB, and he is also retarded (as well as having CP), but no more acutely than others now benefitting from the attractive setting, experienced programming, and qualified staff of Frampton Hall.[29]

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[29] The attractiveness of the setting was observed in a tour of Frampton Hall 2 May 1985 in which I was included. This opportunity was helpful to an understanding of subsequent testimony, but my decision is based solely on the evidence developed in the hearing in light of the applicable law as I understand it.

It would unduly burden any reader of this decision were I to rehearse here chapter and verse with respect to each and every one of the characteristics attributable to Clifford's handicapping conditions in comparison to the characteristics of each and every one of Frampton Hall's present students. I believe my review of the testimony, together with exhibits referred to, provides enough of that to establish that Clifford is unique only insofar as this is true of each human being. Otherwise, with due regard for the requirements of #200.6(a), Commissioner's Regulations, the mix is there, i.e., nothing precludes Clifford from being grouped in Frampton Hall "by similarity of individual needs" in accordance with: range of academic or educational achievement; social development; physical development; and management needs. IEB has a responsibility to maintain a proper educational program for existing students, it is true, but I find no basis to conclude that Clifford's addition to the program would compromise IEB in discharging this responsibility. Clifford, to put it colloquially, would not stand out like a sore thumb. Neither his strength (communication), nor his shortcomings (ADL skills, acting out, whatever) should present problems for IEB more serious than those now confronted in Frampton Hall.[30]

Respondent makes a point in its memorandum that "certain factors affect clinical evaluations of a child, so that the clinical evaluator may view the child differently than a person familiar with the child." (RMem 11) The statement is made with reference to the testimony of Daly, but it should be noted in this connection that there is no evidence of any effort on the part of IEB to have communicated with Daly (or with Young) to get the benefit of personal insight from past experience in working with Clifford. In this memorandum counsel forcefully argues Respondent's case with respect to Clifford's speech and behavior, but the evidence in its entirety is compelling to the effect that he is not significantly to be distinguished in these respects, or otherwise, from the students now in Frampton

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[30]One might speculate whether IEB's concerns about Clifford's acceptance would be as great were it not intended to phase out Frampton Hall. (RMem 9)

Hall. Accordingly, Respondent flies in the face of the evidence, when counsel contends that "Clifford's particular composition of handicaps and needs are not sufficiently similar to the Frampton Hall population breakdown to allow for a correct mixture of students to provide him with an appropriate group without jeopardizing the other students' education." Petitioner is alleged to have sought to "compare children on the basis of only one or two skills levels," but this cannot be squared with the cross-examinations of Guarino and Colamonico, and the conclusions evoked thereby. (RMem 21)

Also not to be lost sight of is Respondent's focus on the present situation (i.e., 1985-86) in Frampton Hall, rather than the situation as it was in November of 1984 and the 1984-85 school year. If Clifford should have been recommended for appointment in January, 1985,[31] as I am inclined to believe, it ill behooves Respondent to argue that extant student grouping is not conducive to Clifford's placement in Frampton Hall. In fact, Clifford's higher level verbal skills and lower level ADL skills both could have been accommodated within the framework of 1984-85 grouping, and, contrary to Respondent's allegations, this can be accomplished at the present time as well. The match-up may not be perfect, but perfection is not the standard to be applied here. Rather, the concern is appropriateness, and that involves grouping of individuals with similar needs so as to provide for a student to derive educational benefit from the school experience. Clearly, Clifford Burr would find himself among peers in Frampton Hall.

Another point raised by Respondent, in counsel's memorandum supplementing evidence in the hearing, concerns the fact that Frampton Hall operates with a program of self-contained classes. In light of Daly's testimony, reflecting her experience in AABR and elsewhere, this appears to be a factor of no consequence as far as Clifford's educational needs are concerned. Nor do his mannerisms of behavior loom large in

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[31]The notification of 2 January 1985 was later than required under the Commissioner's Regulations.

terms of the impact to be expected of him on other children in his class. He has no peculiarities of behavior that can be contrasted to all of the students now enrolled at Frampton Hall.

It is Respondent's position that "P.S. 396, relative to Frampton Hall, provides a less restrictive environment because it is public, closer to home, and there is more contact with less handicapped children." (RMem 37-38) Although "least restrictive environment" is implicitly a proper consideration, there is no specific reference about this in the applicable section of the Regulations (#200.7(d)), and the MDT's reasons for not accepting Clifford did not include this point. Furthermore, P.S. 396 as an alternative placement is not within the purview of my concern in reaching a decision in this hearing for the same reason.[32] Nothing in the evidence leads me to believe that an appropriate less restrictive environment was available for the education of Clifford when his parents asked SED for help, were referred to IEB, and IEB turned him down. Nor does Respondent's contention about travel time cause misgivings; the expected time to travel by bus from the Burr residence in Brooklyn to IEB in the Bronx would apparently be not much, if any, longer than Clifford has experienced going to and from AABR.

Another section of Respondent's memorandum deals with IEB's admissions policy, counsel claiming that the Trott letter to Cort "implicitly, if not explicitly, referred to the admission standards as a reason for the negative recommendation and, therefore, was sufficient notice." Moreover, they call attention to the fact that the Burrs had been "told that no student like Clifford had been admitted to Frampton Hall for three years." (RMem 42-43) I find no evidence of compliance with statutory requirements in these circumstances, apart from the question of whether in any event IEB may unilaterally modify admissions policy or criteria without regard to the Commissioner's exercise of the power to make referrals. As previously noted, the witness Guarino, who served in SED before becoming Director of IEB, said "My understanding is that the State Education

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[32]Note that P.S. 396 was determined to be "inappropriate." (REx 25)

Department ... can refer to any school at any time for any reason without regard to criteria of schools." (Tr 532/9-13)

Background information about Clifford Burr, relevant to this hearing, began to flow when his parents applied to SED for placement of their son, an application acknowledged by Cort in her letter of 27 September 1984. Cort informed Mr. and Mrs. Burr of the referral of the application to the "NY Institute for Blind," and she asked them to contact the school's admissions office "immediately" for "an appointment for an interview and evaluation of your child." (REx 10) This referral and other information made available to IEB reported on Clifford's experience at AABR (REx 4), and from Curry at the Board of Education, under date of 11/2/84, IEB received clinical data from the files of the COH in District 21. (REx 5) Clifford's father had signed a "Consent for Formal Assessment" 20 September 1984, (REx 6) and this remained in effect until revoked in a letter to Guarino dated 25 April 1985. (REX 21)[33]

All of this information and data about Clifford is essentially in accord with the findings that resulted from the MDT's own evaluations. And these evaluations logically led to recommendations from Gerra and Trott, a total of 13, regarding Clifford's future education. In turn, these recommendations found reflection in the following "Educational Goals" and "Related Services" set forth in the Summary Sheet attached to the Referral Status Notification prepared by the MDT:

Educational Goals

1) Develop readiness and attention skills i.e., sitting still, listening, etc.

2) Develop skill in performing activities for daily living i.e., feeding, toileting, etc.

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[33]In his reply of 30 April 1985, Guarino took the position that " ... your revocation ... must be construed by us as a withdrawal by you of such application (for admission)," a contention that must be consigned to the category of "non-issues." (REx 21)

3) Develop pincer grasp for fine motor manipulation.

4) Improve gait ambulation for increased mobility.

5) Participate in behavior management therapy to increase practice of appropriate behavior and decrease inappropriate behavior.

6) Develop expressive, receptive language skills.

Related Services

Speech Therapy	2/week	40 minute session
Occupational Therapy	3/week	40 minute session
Physical Therapy	2/week	40 minute session
Adaptive Physical Education	3/week	40 minute session
Behavior Management Therapy	2/week	40 minute session

(Orientation & Mobility Services on a consulting basis)
(REx 3 and PEx 5)

Petitioner appears to find no fault with the suggested goals and related services. Nor do I. They establish the parameters within which to fashion appropriate IEPs for Clifford Burr. The difference of opinion here is where this should be done, and in my judgment that place is the Frampton Hall program of the New York Institute for the Education of the Blind. The evidence gives me no alternative to this conclusion.

The time that has been taken from the very beginning of developments in this matter is legitimately a cause for concern. This concern was expressed first by the Burrs when requesting a hearing in their letter of 21 December 1984 to SED's Assistant Commissioner, Lawrence C. Gloeckler, prior to receiving written notification of a recommendation for Clifford from IEB/MDT. Quoting from this letter,

> ... we were referred on 9/27/84 to ... (NYIEB), Bronx, NY. We also provided the NYIEB with extensive background material on our son, and on 11/1/84 dates were scheduled for Clifford's evaluation. Clifford was evaluated on 11/26/84; and, we attended a conference meeting on 11/28/84 for the purported purpose of determining whether our child may be eligible to attend the school.
>
> The participants at the conference ... all voted no ...
>
> We were told that we would be provided with a copy of their rejection notice and recommendation within two weeks; and, although repeated inquiries have been made, nothing has been received to date. We believe that this is in violation of the 40 day time limit to complete the entire evaluation process. (REx 8)

Section 200.4(c) of the Commissioner's Regulations require a COH to "provide a recommendation to the board of education within 30 days of the date of receipt of consent, or within 40 days of the date of receipt of referral, whichever period shall end earlier." Although there is no reference to this section in #200.7(d),[34] which applies to "State-aided schools for the blind," Guarino acknowledged an obligation in this regard. Asked about the number of days allowed for action on an application for admission, he said: "I believe it's 40 days from the date of receipt of referral by the 4201 school ... school workdays." (Tr 1033/14-23) Respondent also acknowledges a "40-day limit" in counsel's memorandum where it is stated that "The fact that the Institute took slightly more time than 40 school days to respond with a formal rejection in no way represents an 'egregious' failure to comply with procedural safeguard." (RMem 56)

The issue of timeliness (or timelines), asserted by the Burrs in their request for the hearing and by Gloeckler in his

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[34]#200.7(d) does mandate notification "comparable to that required by section 200.5(a)" which includes a 30-day limitation.

appointment of a hearing officer for the appeal, led to Petitioner's request for compensatory education of two years. Argument in this regard embodied not only the delays in processing the referral and notifying the parents, but also the question of "bad faith" during the course of the hearing, i.e., deliberate protraction of the proceeding on the part of Respondent causing Clifford Burr to have been deprived of two years of education at IEB.[35]

Balancing the evidence and the arguments of the parties on this issue, I am constrained to come to the conclusion that Clifford Burr is entitled to a period of compensatory education. I am of this mind, however, without attributing all of the unnecessary delay in resolving the controversy about placement to IEB. Petitioner, as previously noted, is not without fault, and neither am I. Moreover, Respondent should not be caused to suffer a penalty because of its announced intention to appeal an unfavorable decision here for review by the Commissioner of Education, a position also assumed by Petitioner. I am also aware of the provisions of #200.7(4) which allow normally for "State-supported schools (to) apply to the commissioner for the termination of the appointment of a pupil." Accordingly, it is my considered opinion that Clifford Burr is entitled equitably to one and one-half (1-1/2) years of additional education at public expense beyond the age of 21 years. My conclusion with respect to this issue reflects the fact that "normal" proceeding, including appeal(s), would have taken up most, if not all, of the 1984-85 school year, but not the current year of 1985-86.

ORDER

In light of the foregoing, it is my decision that the recommendation of the MDT at IEB regarding the further education of Clifford Burr, i.e., that he "not be appointed to

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[35]See post-hearing memoranda for arguments of the parties on the issue of compensatory education, including citations of decisions of the Commissioner and the courts. These decisions, among others cited during the hearing, have been considered in arriving at my decision although not referred to herein.

our program," be overruled. I direct that he shall be recommended for appointment by the Commissioner to placement at IEB immediately, and that his education in this placement shall continue until the end of the school year in which Clifford shall attain the age of 22 years. His educational program shall be in accordance with the specifications appearing in the attachments to the notification of non-acceptance, and appropriate IEPs will be prepared for this purpose. In handing down this order, I am mindful of the presence of students in Frampton Hall who are younger than Clifford Burr so that his participation in this program will not entail any delay on the part of IEB in phasing out the program.

IT IS SO ORDERED:

/s/ A. William Larson
A. William Larson
Impartial Hearing Officer

Date: January 27, 1986

Notice: Either party, or both, may appeal to have this decision reviewed by the Commissioner of Education. Information regarding appellate procedure may be obtained by writing to the Office of Counsel, State Education Department, State Education Building, Albany, N.Y. 12234.

Supreme Court, U.S.
FILED
FEB 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1091

IN THE

Supreme Court of the United States

October Term, 1989

THOMAS K. SOBOL, as Commissioner of the New York State Education Department,

Petitioner,

v.

CLIFFORD BURR, by his Parents and Next Friends, KENNETH BURR, BETTY BURR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Action Is Moot, Since the Plaintiff Will Complete the Educational Term Awarded by the Hearing Officer on June 21, 1990, Regardless of Any Decision Rendered by This Court.

II. Whether the Unique Facts and Limited Precedential Value of This Case Make It an Inappropriate Case in Which to Grant a Writ of *Certiorari*.

III. Whether the Reinstatement Relief Fashioned by the Court of Appeals Removes the Case From the Scope of the Eleventh Amendment.

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TABLE OF AUTHORITIES

STATUTORY PROVISIONS

42 U.S.C. § 2000d-7(a)(1) (Supp. 1988) provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Clifford Burr, by his parents and next friends, Kenneth and Betty Burr, respectfully requests that this Court deny the petition for a writ of *certiorari* seeking review of the opinion and judgment of the United States Court of Appeals for the Second Circuit. That opinion is reported at 888 F.2d 258 (2d Cir. 1989).

Statement of the Case

Clifford Burr is a severely handicapped young man who suffers from blindness, profound mental retardation, and cerebral palsy. Appendix ("App.") at 45a.[1] In 1984, the private school he attended at public expense under the Education of the Handicapped Act ("EHA") closed. Thereafter, since the New York City Board of Education could not arrange appropriate placement for Clifford,[2] his parents requested that petitioner, the New York State Commissioner of Education ("Commissioner"), appoint Clifford to a "state-operated" or "state-supported" school. The Commissioner then referred Clifford to the New York Institute for the Education of the Blind ("Institute"), a state-supported school. App. at 4a. The Institute took more than twice the permitted length of time to complete its evaluation of Clifford, and then rejected him on the ground that it allegedly did not have an appropriate program from which he could benefit.[3] App. at 46a-47a.

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1. Citations to the Appendix refer to the supplementary appendix filed in conjunction with the petition for *certiorari*.

2. After receiving notification of the plan to close Clifford's private school, the Committee on the Handicapped ("COH") of Clifford's local school district initially recommended placement in a proposed program at P.S. 396 in Brooklyn, New York. App. at 80a. After the Burrs objected that the school had not yet developed a curriculum, App. at 80a, 95a, and the assistant superintendent of citywide programs expressed doubts as to whether this program was appropriate for Clifford, App. at 36a, the COH withdrew its recommendation and determined that there was no appropriate program for Clifford in the New York City public school system. App. at 36a. Subsequently, the P.S. 396 placement was reinstated, App. at 108a n.21, and an impartial hearing officer ruled that the P.S. 396 placement was inappropriate. App. at 40a, 109a n.23. That decision was not appealed by the New York City Board of Education and is therefore final.

3. As the Hearing Officer found, the Institute failed to mention its Frampton Hall Program which enrolled blind, profoundly retarded students similar to Clifford. App. at 111a-115a.

The combination of the illegal delays and the wrongful rejection kept Clifford out of school for nearly two full school years.

a. Administrative Proceedings

The Burrs promptly requested a hearing on December 21, 1984, in accordance with the procedures under the EHA and similar New York State regulations. 20 U.S.C. § 1415(b)(2); N.Y. Comp. Codes R. & Regs. tit. 8, § 200.7(d) (1986). The Commissioner appointed a hearing officer as provided in the then applicable N.Y. State regulations.[4] Although the EHA requires that a hearing officer *render a decision* within 45 days after the request for a hearing, 34 C.F.R. § 300.506, the Burrs' hearing did not even begin until four months after the request, and concluded eight months later. Consequently, the decision of the hearing officer was not rendered until January 27, 1986, more than a year after the Burrs' request for a hearing.

The hearing officer allowed testimony on many issues which he later found irrelevant; he subsequently acknowledged this, stating, "It is readily apparent in retrospect that the hearing could have, and should have, been curtailed.... I should have restricted Respondent [Institute] in regard to issues." App. at 109a n.23. The Commissioner himself subsequently concluded that "[t]he delay in this instance appears to be attributable *solely* to the management of the hearing by the hearing officer, and is unconscionable." App. at 42a (emphasis added).

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4. The regulations have since been amended. *See infra* p. 6 n.9.

The hearing officer found that the Institute was an appropriate placement for Clifford, and in recognition of Clifford's failure to receive appropriate education during the unlawfully protracted proceedings, ordered that Clifford's education be extended until the end of the school year in which he reaches the age of 22 years. App. at 118a, 121a.

The Institute then appealed the decision to the Commissioner, and once again illegal delays ensued. Although the EHA provides that decisions of hearing officers appointed by the state educational agency be final except for judicial review,[5] the Commissioner accepted the appeal. Furthermore, although EHA regulations require that administrative appeals, where permitted, be decided in 30 days,[6] the Commissioner took 49 days.

Although the Commissioner agreed with the hearing officer that the Institute was an appropriate placement for Clifford, and that the delays in the administrative process had been "unconscionable," he nevertheless rejected the hearing officer's order to extend the period of Clifford's education. App. at 42a.

As a result of the protracted administrative proceedings, Clifford remained out of school from September 1984 until June 10, 1986, almost two full school years. During that period, Clifford received no education whatsoever, aside from intermittent home tutoring provided by the New York City Board of Education.

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5. 20 U.S.C. §§ 1415(e)(1), 1415(e)(2).

6. 34 C.F.R. § 300.512(b).

b. Proceedings in the District Court

Clifford, by his parents, commenced this action in September 1986 in the United States District Court for the Southern District of New York. App. at 28a. The complaint, as amended, sought to reinstate that portion of the decision of the hearing officer that extended Clifford's education under the EHA to the end of the school year in which he attains the age of 22.[7] A supplemental complaint was later filed asserting a claim against the petitioner for attorneys' fees arising from the administrative proceedings in which Clifford prevailed on the issue of appointment to the Institute. App. at 19a n.1.

On November 9, 1987, the district court (Carter, J.) issued an opinion dismissing Clifford's claims against the petitioner. App. at 32a. On March 9, 1988, the district court denied the claim for attorney's fees against the petitioner for the administrative process, and granted Clifford leave to file an amended supplemental complaint seeking such fees from the Institute, which the court found was the adverse party in the administrative proceedings. App. at 25a. On March 18, 1988, the district court certified all claims against the petitioner for appeal pursuant to Fed. R. Civ. P. 54(b). App. at 5a.

c. Proceedings in the Court of Appeals

Clifford appealed the district court's order dismissing his claims against petitioner to the United States Court of Appeals for the Second Circuit (Feinberg, C.J.), which exercised jurisdiction over the due process claims and reversed the judgment of the district court.[8] The court found that

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7. In the alternative, Clifford sought an award of compensatory education. App. at 31a.

8. The court of appeals ruled that, given the pendency of the attorney's fees claim against the Institute, the district court exceeded its discretion in certifying the attorney's fees claim against petitioner, and, therefore the

Clifford was injured by the delays in the hearing process, and concluded that petitioner's review of the hearing officer's decision violated the finality and impartiality provisions of the EHA. App. at 11a. In an opinion reported at 863 F.2d 1071 (2d Cir. 1988), the court vacated the Commissioner's decision and reinstated the final decision of the state-appointed impartial hearing officer who had extended Clifford's education for one year to provide him the full educational period required by the EHA. App. at 16a-17a.

Specifically, the court found that the protraction of Clifford's hearing for 13 months "grossly violated" the time limits mandated by both federal and New York regulations. App. at 9a. The court further determined that the State Commissioner's review of the state-level hearing officer's decision violated both the finality[9] and impartiality[10] requirements of the EHA. 20 U.S.C. §§ 1415(e)(1), 1415(c); App. at 11a-13a.

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court lacked jurisdiction over the attorney's fees claim against the Commissioner on the appeal. App. at 7a.

9. While New York State regulations permitted petitioner to review the decision of the state appointed hearing officer, *see* N.Y. Comp. Codes R. & Regs. tit. 8, §§ 200.5(d), 200.7(d)(1) (1987), the controlling provisions of the EHA prohibited such review by mandating that the decision of a state-appointed hearing officer be final. App. at 12. The court noted that the United States Department of Education had warned the New York Department of Education that the New York regulations in question might not be federally approved, unless they were changed to conform with the requirements of the EHA. App. at 12a. Thereafter, the New York State Education Department, in 1987, amended its regulations so that a local school board, rather than the Commissioner, appoints the hearing officer where state-supported schools are involved. *See* N.Y. Comp. Codes R. & Regs. tit. 8, § 200.7(d)(ii) (1987).

10. The court determined that the Commissioner was not an impartial review officer in the unusual circumstances of this case "because he has extensive responsibilities and is integrally involved with the operation of state-supported schools, such as the Institute." App. at 13a.

In light of these violations of the EHA, the court vacated the Commissioner's decision, thereby reinstating the decision of the hearing officer. In finding that this action did not implicate the eleventh amendment, the court stated:

> [W]e believe that it is possible to reinstate the relief fashioned by the hearing officer without addressing the eleventh amendment issue. This panel is merely vacating the decision of the Commissioner, and reinstating the decision of the hearing officer. The hearing officer is a decisionmaker designated by the State and is not constrained by the eleventh amendment.

App. at 16a. The court further noted that, in any event, the relief awarded to Clifford was "purely prospective in nature, and any effect on the state treasury is ancillary to such relief and therefore permissible despite the eleventh amendment." App. at 17a.

Accordingly, the court reversed the district court's order and remanded to the district court with instructions to vacate the Commissioner's decision and reinstate the hearing officer's decision. The court's judgment was entered on December 12, 1988.

d. Prior Proceedings in this Court

The Commissioner petitioned this Court for a writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit while *Dellmuth* v. *Muth*, 491 U.S. ___, 109 S. Ct. 2397 (1989) was pending before this Court. This Court then decided *Dellmuth*, holding that the EHA did not abrogate states' eleventh amendment immunity. This Court subsequently granted *certiorari* in *Burr*, vacated the judgment of the Second Circuit, and remanded the case "for further consideration" in light of its decision in *Dellmuth*. *Sobol* v. *Burr*, 491 U.S. ___, 109 S. Ct. 3209 (1989).[11]

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11. A bill recently passed the United States Senate which would overrule the result in *Dellmuth* by clarifying congressional intent to abrogate states' immunity under the EHA. *See infra* p. 10 & n.13.

e. Proceedings on Remand to the Second Circuit

Pursuant to this Court's mandate, the Second Circuit vacated its judgment on August 3, 1989, and subsequently asked the parties to submit briefs as to the effect of *Dellmuth* on its prior decision in *Burr,* 863 F.2d 1071 (2d Cir. 1988). After receiving the briefs, the court reaffirmed its prior holding and reinstated the decision of the impartial hearing officer, noting the unique nature of this relief and adhering to its position that its holding did not implicate the eleventh amendment:

> We did not base our holding in *Burr* on the abrogation of the states' Eleventh Amendment immunity because we did not believe it was necessary to reach that question in that case. . . . We concluded, for two alternative reasons, that the amendment was not violated. First, *our decision merely vacated a decision of the Commissioner of the New York State Education Department and reinstated the decision of a state hearing officer,* whose award of relief is not limited by the Eleventh Amendment. Second, *the relief granted the handicapped youth was prospective in nature, and any effect on the state treasury would be ancillary to such relief and therefore permissible despite the Eleventh Amendment.* . . . We have considered the effect of *Muth,* and we continue to believe that the Eleventh Amendment is not violated in this case.

Burr, 888 F.2d at 259 (emphasis added).

Clifford, who turned 22 in December, 1989, is currently attending school at the Institute, and will complete his final term there on June 21, 1990.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Action Has Become Moot, Since Clifford Will Complete the Educational Term Awarded by the Hearing Officer on June 21, 1990, Regardless of Any Decision Rendered by This Court.

Clifford, by his parents, brought this action on his own behalf to regain the one year of education that the hearing officer granted in January 1986. He will complete that school year on June 21, 1990. It is unlikely that this Court would reach a decision on the merits and issue a mandate before that date.[12] Therefore, since Clifford has been admitted for his final term at the Institute and will complete his term there regardless of any decision on the merits rendered by this Court, there is no longer a "live" case or controversy for this Court to review. *See DeFunis* v. *Odegaard,* 416 U.S. 312, 319 (1974) (holding an action to be moot where "the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any

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12. This brief in opposition is due on February 3, 1990, and considering the timetable for appeals and the fact that the last date scheduled for oral argument this term is April 21, 1990, it is unlikely that this case would be heard before the October 1990 Term unless the case were disposed of summarily. If *certiorari* were granted as early as February 14, the petitioner's brief would be due on March 31 at the earliest (Sup. Ct. R. 25.1); respondent's brief would be due on April 30 at the earliest (Sup. Ct. R. 25.2); and the petitioner would have until May 30 at the earliest to reply (Sup. Ct. R. 25.3). Thus, it is unlikely that oral argument would be heard this term, and the case would then be put over until October 1990, months after Clifford completes his education at the Institute.

Even if this case were heard on an expedited basis, it is still unlikely that a decision and mandate would issue before Clifford completes his final term at the Institute.

decision this Court might reach on the merits of this litigation").

This case clearly does not present a question that is "capable of repetition, yet evading review." *See Roe* v. *Wade*, 410 U.S. 113 (1973). This action was an individual complaint brought on Clifford's behalf. Because Clifford will no longer have any right to education under the EHA after June 1990, there is no possibility that he could suffer the same wrong again. This action is certainly not "capable of repetition" as far as Clifford is concerned. *See DeFunis*, 416 U.S. at 319. *Cf. Honig* v. *Doe*, 484 U.S. 305 (1988) (holding an EHA action was not moot where a plaintiff was only 20 and could suffer the same wrong again). Furthermore, as in *DeFunis*, there is no reason why the issues in this case would necessarily evade review.

In addition, there is pending legislation which would moot the eleventh amendment issue. A bill recently passed by the United States Senate provides that under the EHA "[a] State shall not be immune under the eleventh amendment of the Constitution of the United States from suit in Federal Court." S. 1824, 101st Cong., 1st Sess. § 3 (1989).[13] This legislation would explicitly overrule the result in *Dellmuth* by clarifying Congress' intent to abrogate states' eleventh amendment immunity under the EHA.

This Court should therefore deny the petition for *certiorari* since the case at bar and the issues it presents have become moot.

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13. The Bill, tentatively entitled the "Education of Individuals with Disabilities Act of 1989," was passed by the Senate on November 16, 1989, and is presently pending before the House of Representatives, where passage is likely.

II.

The Court of Appeals' Decision Raises No Issues of Precedential Importance Beyond the Unique Facts of This Case, and Also Does Not Present an Issue Under the Eleventh Amendment.

The facts of the *Burr* case are unique, and differ in almost every respect from the typical special education case in the federal courts. These facts led the court of appeals to reinstate the hearing officer's decision, a novel award of prospective relief which will almost certainly never be duplicated in the special education context. The decision of the court of appeals therefore raises no issues of precedential importance, and does not violate the eleventh amendment.

A. The unique facts of the case and relief fashioned by the court of appeals, the fact that the state regulations on which the Commissioner relied have been changed, and the likelihood of congressional action to abrogate states' immunity under the EHA, makes this an inappropriate case in which to grant a writ of *certiorari*.

The circumstances of this case are unusual, and will almost certainly never be repeated. First, the protracted administrative hearing which the court of appeals found violative of the act was extraordinary: there were sixteen hearing days conducted over a period of more than one year. App. at 52a. In addition, the injury which Clifford suffered due to this delay was compounded by factors not typical in the special education context.[14] Because of the closing of his state-funded private school placement, Clifford remained out of school

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14. The State eventually acknowledged its responsibility for causing the delays which led to Clifford's loss of education time. *See supra* p. 3.

during the entire pendency of the administrative proceeding, nearly two full school years. In the typical special education hearing and appeal, the "stay put" provisions of the EHA, 20 U.S.C. § 1415(e)(3), would have prevented the occurrence of such an exclusion from school. The situation was exacerbated by the fact that Clifford's parents were unable to front the costs of his education in a private school. This combination of circumstances led the hearing officer to extend Clifford's education, in an effort to provide him meaningful relief. The court of appeals agreed and reinstated that decision. App. at 16a-17a.

This case is also unique in that the administrative review process which the court of appeals found to be violative of the impartiality and finality requirements of the EHA, has been revamped. *Compare* N.Y. Comp. Codes R. & Regs. tit. 8, § 200.7(d) 1986 *with* § 200.7(d) (1987). A dispute between a parent and the Commissioner over appointment to a state-supported school is no longer resolved by the Commissioner, as was true in Clifford's case, but by an independent state-level review officer.[15] As the court of appeals noted, the United States Department of Education had warned the New York Department of Education that the New York regulations in question might not be federally approved, unless they were changed to conform with the requirements of the EHA. App. at 12a. Thereafter, in 1987, the New York State Education Department amended its regulations.

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15. Even the original process that the court of appeals considered is of no national importance. Only three states, Pennsylvania, New York and Minnesota, retain a system of chief state school officer review. Amicus Brief of American Civil Liberties Union, et al. at 19, *Dellmuth* v. *Muth*, 109 S. Ct. 2397 (1989) (No. 87-1855).

In addition, it was not the court that granted the award of compensatory education here, which is the usual situation; rather, it was a state-level hearing officer who granted Clifford a period of education to make up for the schooling he had lost due to the administrative delay. The court of appeals merely reinstated that decision. Also, in contrast to the monetary relief commonly requested by plaintiffs in EHA actions,[16] Clifford simply sought reinstatement of a favorable decision.

Furthermore, this case is also unique because, after this action was filed, Congress amended the Rehabilitation Act of 1973 to make clear its intent to abrogate states' eleventh amendment immunity. *See* 42 U.S.C. § 2000d-7(a)(1) (Supp. 1988). Congress also amended the EHA to provide parents and children a remedy under the Rehabilitation Act for education claims of handicapped students. 20 U.S.C. § 1415(f). These statutory developments further diminish the likelihood that the controversy involved here will be repeated.

Finally, a bill recently passed the United States Senate which would make clear Congress' intent to abrogate states' eleventh amendment immunity under the EHA, and therefore would ensure the lack of precedential value of this case.[17]

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16. *See, e.g., Susan R.M.* v. *Northeastern Independent School District*, 818 F.2d 455 (5th Cir. 1987); *Alexopoulos* v. *San Francisco School District*, 817 F.2d 551, 553 (9th Cir. 1987); *Gallagher* v. *Pontiac School District*, 807 F.2d 75, 76 (6th Cir. 1986); *Wexler* v. *Westfield Board of Education*, 784 F.2d 176 (3d Cir.), *cert. denied*, 479 U.S. 825 (1986). Since the petitioner relies on all of the above cases at various points throughout the petition, *see* Petition at 11, 14, 17, it is particularly noteworthy that Clifford sought only equitable reinstatement relief, and not money damages as did the plaintiffs in all of the above actions.

17. *See supra* p. 10 & n.13.

B. Furthermore, the novel reinstatement relief fashioned by the court of appeals does not violate the eleventh amendment.

In its decision, the court of appeals found that the eleventh amendment was not implicated by its reinstatement of the state-level hearing officer's decision, stating:

> We did not base our holding in *Burr* on the abrogation of the states' Eleventh Amendment immunity because we did not believe it was necessary to reach that question in that case. . . . We concluded, for two alternative reasons, that the amendment was not violated. First, *our decision merely vacated a decision of the Commissioner of the New York State Education Department and reinstated the decision of a state hearing officer*, whose award of relief is not limited by the Eleventh Amendment. Second, *the relief granted the handicapped youth was prospective in nature, and any effect on the state treasury would be ancillary to such relief and therefore permissible despite the Eleventh Amendment*. . . . We have considered the effect of *Muth*, and we continue to believe that *the Eleventh Amendment is not violated in this case*.

Burr, 888 F.2d at 259 (emphasis added). Thus, this Court should not grant *certiorari* as this case presents no eleventh amendment issue.[18]

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18. Similarly, in its original decision, the court of appeals noted that:

> This panel is merely vacating the decision of the Commissioner, and reinstating the decision of the hearing officer. The hearing officer is a decisionmaker designated by the State and is not constrained by the eleventh amendment. Therefore, *we do not implicate the eleventh amendment by expunging the bar to his decision*.

App. at 16a (emphasis added).

The Second Circuit clearly rested its grant of relief to Clifford on grounds entirely outside the scope of the *Dellmuth* holding and the eleventh amendment. *Burr*, 888 F.2d at 259; App. at 16a-17a. Because the state commissioner violated the EHA's finality requirement by improperly vacating an impartial hearing officer's decision, the court simply reinstated the decision of the hearing officer, relief which is "purely prospective in nature." App. at 17a. The court did not consider the eleventh amendment a bar to Clifford's recovery, concluding that the reinstatement of the hearing officer's decision "d[id] not implicate the eleventh amendment." App. at 16a. The decision of the court of appeals did no more than void the Commissioner's illegal review and reinstate the hearing officer's decision. Therefore, it did not involve a control of the actions of state officials by federal courts which is barred by the eleventh amendment.

Furthermore, the relief sought by Clifford, while perhaps "'compensatory' in nature," is simply equitable reinstatement relief and is purely prospective in effect. *See Milliken* v. *Bradley*, 433 U.S. 267, 290 (1977). In *Milliken*, the Sixth Circuit affirmed an order to implement remedial education programs designed to remedy the continuing effects of past racial discrimination. *Id.* at 277-78. In upholding this relief, this Court held that the remedial education programs were entirely prospective in character despite the fact that the state would be required to pay one-half the costs of the programs. *Id.* at 288-290. This Court concluded that the programs, while "'compensatory' in nature. . . . [we]re part of a plan that operates *prospectively* to bring about the delayed benefits" of the state's educational system. *Id.* at 290. Clifford's underlying compensatory education claim is similarly prospective in operation, and therefore is permissible

under the eleventh amendment,[19] notwithstanding any ancillary effect on the state treasury. App. at 16a. *See Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974). Thus, even if the court of appeals had directly ordered the State to provide compensatory education, that order would not have violated the eleventh amendment since such relief would be substantially identical to that approved by *Milliken*.[20]

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19. Petitioner argues that the relief awarded here "was designed solely to compensate an individual plaintiff for past violations of law," and that, therefore, *Milliken* is not controlling. Petition at 16. Petitioner, however, has failed to acknowledge the State's pattern and practice of denying handicapped students a free appropriate education, circumstances similar to the history of segregation sought to be remedied by the Court in *Milliken*. *See Jose P.* v. *Ambach*, 557 F. Supp. 1230, 1233, 1241 (E.D.N.Y. 1983) (judgment declaring that State had failed to provide free appropriate education to handicapped students was sustained, since court found a "history of over a decade of failure to accord the handicapped their rights").

20. A number of decisions are in agreement with this point. *See, e.g., Miener* v. *State of Missouri*, 800 F.2d 749, 754 (8th Cir. 1986) (Eighth Circuit holds that plaintiff could be granted a compensatory education award if she could prove a violation of the EHA by the State — which Clifford successfully proved here — based on this Court's decision in *Burlington School Committee* v. *Department of Education*, 471 U.S. 359 (1985), which held that monies which would have been spent all along if not for official misconduct, are not damages); *Lester H.* v. *Carroll*, No. 86-6852 (E.D. Pa. Nov. 9, 1989) (LEXIS, Genfed library, Dist file) (two and one-half year compensatory education award "is appropriate relief under EHA" because "[t]here is no bar to such recovery ... imposed by the eleventh amendment"). *See also Jefferson County Board of Education* v. *Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988) (Eleventh Circuit orders two years of compensatory education beyond the age of 21).

On the other hand, *Alexopoulos* v. *San Francisco School District*, 817 F.2d 551 (9th Cir. 1987), states that compensatory education in EHA cases is more akin to damages than to the prospective relief approved in *Milliken*. However, that statement was wholly unnecessary to the decision, since the court ultimately held that the plaintiff's claims were either meritless or timebarred. *Id.* at 556.

Neither *Green* v. *Mansour*, 474 U.S. 64 (1985), nor *Papasan* v. *Allain*, 478 U.S. 265 (1986) require a different result. Neither case involved a state-level determination which could be reinstated by a federal court finding a violation of federal law. Furthermore, unlike Clifford Burr, the plaintiffs in *Green*[21] and *Papasan*[22] could not claim an ongoing violation of federal law. Here, Clifford suffered an ongoing violation of the EHA because, absent the relief ordered, Clifford would continue to be denied the amount of education the EHA guarantees. In any event, as discussed above, the relief awarded by the state-level hearing officer is virtually identical to that awarded in *Milliken*.

The EHA was enacted in response to a long history of discrimination in education and to many court decisions affirming a constitutional right to equal educational opportunities.[23] To combat discrimination against handicapped

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21. In *Green*, any claim the plaintiff welfare recipients had to prospective relief, which would have been permissable under *Ex Parte Young*, 209 U.S. 123 (1908), was moot since Congress had amended the relevant federal statute so that the state regulations at issue no longer violated federal law. *Green*, 474 U.S. at 68-73.

22. In *Papasan*, this court rejected, as violative of the eleventh amendment, a claim that Mississippi officials could be required to make monetary payments for past breaches of trusts that were created for the benefit of public schools. *Papasan*, 478 U.S. 280-81. Nevertheless, the Court held that an equal protection claim based on the present unequal distribution of the benefits of the state's school lands was the type of ongoing violation for which a remedy may be permissibly fashioned under *Ex Parte Young*, 209 U.S. 123 (1908). *Papasan*, 478 U.S. at 282.

23. "Regrettably, equal educational opportunity has yet to become a reality for millions of handicapped children... for years, handicapped children have been kept in the dark, deprived of a free, full public education." 121 Cong. Rec. H37,030 (1975).

Also, the Senate Report accompanying the EHA emphasized that the Supreme Court's 1954 desegregation decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), established that the Constitution guarantees

children and to ensure their rights to equal education, the EHA mandates that all handicapped children between the ages of 3 and 21 receive a free appropriate public education. 20 U.S.C. § 1412(2)(B). Congress intended that handicapped children receive appropriate education for 18 years, and not just in those periods when state officials agree to comply with the EHA.[24] Without the ability to award even prospective injunctive relief, courts would be powerless to correct state violations of the EHA, and, as the court of appeals noted, "Clifford's right to an education between the ages of three and twenty-one [would be] illusory."[25] App. at 15a. The Second Circuit's decision, which did no more than expunge the state Commissioner's unlawful review and reinstate the impartial hearing officer's decision, is a necessary and appropriate response to an egregious violation of federal law by a state official.

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the opportunity of an education as "a right which must be made available to all on equal terms." S. Rep. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Admin. News 1425, 1430.

24. Because Clifford was 7 years old when the EHA was enacted, he was entitled to 14 full years of education.

25. *See also Jefferson County Board of Education* v. *Breen*, 853 F.2d 853, 857-58 (11th Cir. 1986) ("[c]ompensatory education . . . is necessary to preserve a handicapped child's right to a free appropriate education").

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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No. 89-1091

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS SOBOL, as Commissioner of the New York State Education Department,

Petitioner,

– against –

CLIFFORD BURR, by his Parents and Next Friends, KENNETH BURR, BETTY BURR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

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PETITIONER'S REPLY BRIEF

Respondent urges the Court to deny the petition for certiorari because the action is moot, stating that Clifford Burr will complete the year of compensatory education before the Court can resolve the merits of the petition. Respondent cites *DeFunis v. Odegaard*, 416 U.S. 312 (1974) in support of his argument. Respondent's Brief in Opposition at 9, 10. The action is not moot because a decision in petitioner's favor, whether after summary or plenary consideration by the Court, would enable petitioner to shift the cost of Clifford Burr's education at the Institute for the summer of 1989 and the 1989-90 school year from the State to either the Institute or the Burrs. In addition, the question presented by this petition is not a question of admission to

a school as in *DeFunis v. Odegaard*, 416 U.S. at 314. The Commissioner upheld the decision of the Hearing Officer on Clifford's attendance at the Institute. The question of admission to the Institute was never an issue in this litigation because, as the district court held, respondent was not aggrieved by that decision and did not seek federal court review of that aspect of the decision. S. App. at 30a.

Rather, the question raised by the petition is whether the Second Circuit's judgment requiring the State to fund an additional year of education for Clifford at the Institute after the age of 21 because of past procedural violations violates the eleventh amendment. If it does, then the State cannot be required to pay for respondent's tuition at the Institute and can recover it from the Institute or the Burrs. The Commissioner has not appointed Clifford to the Institute for the summer of 1989 or for the academic year 1989-90. Appointment by the Commissioner is required for public funding of a pupil's tuition at the Institute. N.Y. Educ Law §§ 4206, 4207(4). Thus, a reversal of the judgment below will leave no authority for public funding of Clifford's education at the Institute for that time period for which he was not appointed. Clifford will be in the position of private pupils not appointed by the Commissioner to the Institute who pay tuition directly to the Institute. There will be no authority for public funding of his tuition. Thus, the action is not moot.

Nonetheless, if the Court does decide that this action is moot, it should not deny the petition for certiorari, as respondent urges. Rather, it should follow the general practice of this Court for dealing with a case which has become moot on its way to the Court, namely, grant the petition for certiorari, and vacate the judgment below with a direction to dismiss the action as moot. Such action eliminates the *res judicata* effect of a decision which has become unreviewable. *United States v. Munsingwear*, 340 U.S. 36 at 39 and n.2 (collecting cases) (1950); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1950); *see DeFunis v. Odegaard*, 416 U.S. at 320; Supreme Court Practice, R. Stern, E. Gressman, S. Shapiro, §§ 5.13, 18.5 (6th ed. 1986).

CONCLUSION

FOR THE FOREGOING REASONS, THE COURT SHOULD GRANT THE PETITION AND REVERSE THE JUDGMENT OF THE SECOND CIRCUIT.

Dated: New York, New York
February 12, 1990

Respectfully submitted,

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